

A CONSTITUTIONAL CHAMELEON: THE VICE PRESIDENT'S PLACE WITHIN THE AMERICAN SYSTEM OF SEPARATION OF POWERS

PART I: TEXT, STRUCTURE, VIEWS OF THE FRAMERS AND THE COURTS

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“It is one of the remarkable things about . . . [the Vice President], that it is hard to find in sketching the government any proper place to discuss him.”

– Woodrow Wilson, *Congressional Government*

I. INTRODUCTION

The issue of which branch¹ or branches the Vice President resides in has not received full-length treatment in the academic literature. When scholars have analyzed the vice presidency and been confronted with the question, most have made only brief mention of the Vice President's constitutional status. Many seem content to conclude that the position is simply “anomalous” or a “hybrid” and to leave matters at that.²

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1. “Branch,” “department,” and “establishment” will be used interchangeably in this article and its companion.

2. *See, e.g.*, JAMES E. HITE, *SECOND BEST: THE RISE OF THE AMERICAN VICE PRESIDENCY* 197 (2013) (noting “the outwardly hybrid status of the office”); *id.* at 95 (referring to “the unique, inherent duality of the institution”); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861*, at 181 (2005) (“The Vice-President . . . was and remains an anomalous officer with an executive title but without executive responsibility under the Constitution”); JODY C. BAUMGARTNER, *THE AMERICAN VICE PRESIDENCY*

RECONSIDERED 7 (2006) (“[T]he vice presidency is a constitutional hybrid”); SIDNEY M. MILKIS & MICHAEL NELSON, *THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT 1776–1993*, at 412 (2d ed. 1994) (“[B]y giving the vice president both legislative and executive responsibilities, the Constitution deprived the office of solid moorings in either Congress or the presidency The office’s hybrid status was bound to make it an object of suspicion in legislative councils because it was partly executive and in executive councils because it was partly legislative.”); MICHAEL HARWOOD, *IN THE SHADOW OF PRESIDENTS: THE AMERICAN VICE-PRESIDENCY AND SUCCESSION SYSTEM 7* (1966) (arguing that the Framers “did not make him [the Vice President] a participant in administration but returned him, in effect, to the legislature This was limbo.”); DONALD YOUNG, *AMERICAN ROULETTE: THE HISTORY AND DILEMMA OF THE VICE PRESIDENCY 3–4* (1965) (the Vice President “dwel[ls] in a constitutional limbo somewhere between the legislative and executive branches of our government.”); Paul Freund, *Foreword* to JOHN D. FEERICK, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION*, at ix (1965) (“[T]he vice-presidency soon became for most of our history a difficult anomaly . . . a constitutional hybrid whose predominant function in the executive or the legislative branch failed of clarification.”); Thomas E. Cronin, *Rethinking the Vice-Presidency*, in *RETHINKING THE PRESIDENCY* 324, 324, 329 (Thomas E. Cronin ed., 1982) (“The vice-presidency is now very much a part of the executive branch and the presidential establishment [although] technically a vice-president is neither a part of the executive branch nor subject to the direction of the president As matters now stand, a vice-president is a full member of neither branch. The office . . . is clearly a constitutional hybrid”); Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 *STAN. L. REV.* 113, 122 n.55 (1995) (dubbing the Vice President “amphibious” since he is “an impeachable executive branch officer . . . with legislative duties”); Arthur Schlesinger, Jr., *Is the Vice Presidency Necessary?*, *THE ATLANTIC MONTHLY*, May 1974, available at <http://www.theatlantic.com/past/docs/issues/74may/schlesinger.htm> (quoting Theodore Roosevelt who termed it as “an utterly anomalous office”); *So you want to be Vice President*, <http://www.vicerepresidents.com/wanttobeVP.html> (last visited Oct. 2, 2012) (“Although the vice president is considered part of the executive branch, the constitution clearly leaves that office in limbo as far as which part of the government it truly belongs to.”); SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 228 (2012) (“[T]he vice presidency instantiates, more than any other office within the national government, the utter impossibility of viewing the United States as being committed to a hermetically sealed version of ‘separation of powers’ and branches of government. The vice presidency should perhaps be viewed as akin to the duck-billed platypus of Australia, an egg-laying mammal that defies our typical classification systems.”); Joseph A. Pika, *The Vice Presidency: New Opportunities, Old Constraints*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* 496, 501 (Michael Nelson ed. 4th ed. 1995) (“[T]he office [is] a ‘constitutional hybrid,’ lacking a home in either branch of government.”); John Eugene Brown, *Woodrow Wilson’s Vice President: Thomas R. Marshall and the Wilson Administration, 1913–1921*, at 478 (1970) (unpublished Ph.D. dissertation, Ball State University) (“The nation’s Vice Presidents have held . . . rather enigmatic positions because of their dual role in government: one foot in the executive branch and the other in the legislative.”); cf. Michael Nelson, *Background Paper*, in *A HEARTBEAT AWAY: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE VICE PRESIDENCY* 63 (Michael Nelson rapporteur 1988) (The “ambiguous constitutional status” of the Vice President means that he is “[a] member of both (or neither) the executive and legislative branches . . . [and] has never been fully at home in either one.”); Joseph F. Menez, *The Vice Presidency of the United States: Up from Oblivion*, 1 *QUEEN’S QUARTERLY* 22, 29 (1958) (stating that “[i]n a constitutional sense, the Vice President is in an anomalous position. He presides over the Senate, although he is not a member of the Senate He is [also] an executive without portfolio.”); Jamin Soderstrom, *Back to the Basics: Looking Again to State Constitutions for Guidance on Forming a More Perfect Vice Presidency*, 35 *PEPP. L. REV.* 967, 984 n.83 (2008) (“it remains uncertain whether the Vice President is a constitutional executive officer.”). The ambiguous constitutional status of the Vice President is not a unique feature of the

The narrower question of former Vice President Dick Cheney's standing within the executive branch, as it involved his executive branch records, was evaluated at the time in two thoughtful student notes, but neither work purported to comprehensively examine the placement of the Vice President within U.S. constitutional structure or to make broad use of judicial or historical materials.³ The more seasoned academic authorities who have squarely taken up the issue have produced only short-form articles on the subject.⁴ This piece is the first in a two-part attempt to remedy this scholarly gap; to draw the lens away from the particulars of Cheney's actions and instead discuss more broadly the legal and historical question of where the Vice President resides in U.S. constitutional structure.⁵

In determining which branch of government the Vice President belongs to, there are essentially four schools of thought: 1) he is part of both the executive and legislative branches, with his exact constitutional locus varying depending on the setting (consequently his constitutional placement could be evenly split between the two branches, primarily a legislative branch position or primarily an executive branch one); 2) he is part of neither branch; 3) he is solely part of the legislative branch; or 4) he is solely part of the executive branch.⁶

national government. Many lieutenant governors have similarly hybrid roles. See *id.* 1018–19.

3. See Aryn Subhawong, Comment, *A Realistic Look at the Vice Presidency: Why Dick Cheney is an "Entity Within the Executive Branch,"* 53 ST. LOUIS U. L.J. 281 (2008); Todd Garvey, Note, *A Constitutional Anomaly: Safeguarding Confidential National Security Information Within the Enigma That is the American Vice Presidency,* 17 WM. & MARY BILL RTS. J. 565 (2008); cf. James D. Myers, *Bringing the Vice President into the Fold: Executive Immunity and the Vice Presidency,* 50 B.C. L. REV. 897, 907–11 (2009). An impressive, unpublished senior thesis also examined the question. See Jonathan Steven Greenberg, *The Vice-Presidency: The Place of Forty Two Men in the American Constitutional and Political System* (1982) (unpublished Senior Honors Thesis, Duke University).

4. See, e.g., Adam J. White, *Will the Real VP Please Step Forward? Defining the Role of the Vice President,* LEGAL TIMES 43 (Oct. 27, 2008), available at adamjwhite.com/wp-content/uploads/realvp.pdf; Barton Gellman, *The Power of Vice: Palin is no Cheney, and Neither is Biden. How much clout will the VP's Successor Have?*, SLATE, Oct. 6, 2008, available at <http://www.slate.com/id/2201638/>; Glenn Harlan Reynolds, *Is Dick Cheney Unconstitutional?*, 102 NW. U. L. REV. 1539 (2007); Josh Chafetz, *Historical Manglings: What Joe Biden and Sarah Palin Don't Understand About the Office They're Applying For*, THE NEW REPUBLIC, October 3, 2008, <http://www.newrepublic.com/article/politics/historical-manglings>. Some scholars have touched upon the Vice President's constitutional placement as part of a discussion of other aspects of the office, but these works do not, nor do they purport to, focus on the matter at hand. See, e.g., Joel K. Goldstein, *The New Constitutional Vice Presidency*, 30 WAKE FOREST L. REV. 505, 515–40 (1995); MICHAEL TURNER, *THE VICE PRESIDENT AS POLICY MAKER: ROCKEFELLER IN THE FORD WHITE HOUSE* 3–25 (1982).

5. See Roy E. Brownell II, *A Constitutional Chameleon: The Vice President's Place within the American System of Separation of Powers: Part II: Political Branch Interpretation and Counterarguments*, 24 KAN. J.L. & PUB. POL'Y (forthcoming Feb. 2015) (companion article).

6. A fifth argument that does not warrant extended discussion is that the Vice President could be considered part of the judicial branch. For instance, the emoluments clauses imply the Vice President could be linked to the judicial branch. The President is prohibited under Article II from receiving emoluments. See U.S. CONST. art. II, § 1, cl. 5. Lawmakers are as well. See *id.*

Ultimately, this article and its companion conclude that the first position is the most persuasive: the Vice President's status within the American constitutional system fluctuates according to the circumstances.⁷ When the

art. I, § 6, cl. 2. According to text, neither the Vice President nor the judiciary labors under such a restriction, underscoring the Vice President's ambiguous constitutional status and perhaps implying he is part of the judiciary. For treatment on whether the Emoluments Clause of Article I applies to the Vice President, see Morton Rosenberg, *Applicability of the Emoluments Clause* (Article I, Section 6, Clause 2) of the Constitution to the office of Vice-President, Congressional Research Serv. Memorandum, Nov. 30, 1973 (on file with author). Possibly one could also argue that because the Vice President—as presiding officer of the Senate—exercises functional judicial power when presiding over non-presidential impeachment trials, he is also part of the judicial branch. These points could dovetail with the Vice President's arguable lack of clear placement in either of the political branches and lead one to conclude he is part of the judicial branch.

For several reasons, however, the contention that the Vice President is in the judicial branch is easily dismissed. First, the Vice President has no textual link to the judicial branch and only remote structural linkages. For instance, unlike federal judges, the Vice President is elevated to office through the Electoral College and not following Senate advice and consent. The Vice President also lacks life tenure and can have his salary reduced. At the same time, the Vice President has clear ties to the elected branches through Articles I and II and the Twelfth, Twentieth, Twenty-Second and Twenty-Fifth Amendments. Second, this argument confuses functional power with being part of a branch of government. As will be seen, the two are closely related but not coextensive concepts. *See infra* Part II.A. Third, there is no historical practice of the Vice President carrying out judicial branch duties. Finally, other authorities have dismissed this suggestion out of hand. *See, e.g.*, Franklin D. Roosevelt, *Can the Vice President be Useful?*, SAT. EVEN. POST, Oct. 16, 1920, at 8; Thias M. Plaisted, *The Vice Presidency of the United States*, 50 SOC. STUDIES 88, 97 (1959); Greenberg, *supra* note 3, at 25.

7. *See* Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President, Advisory Commission on Intergovernmental Relations, 2 (Feb. 7, 1969) [hereinafter *Rehnquist Memorandum*], available at <http://www.fas.org/irp/agency/doj/olc/020769.pdf> (“The Vice President, of course, occupies a unique position under the Constitution. For some purposes, he is an officer of the Legislative Branch, and his status in the Executive Branch is not altogether clear. Nevertheless, the Vice President has been made an Executive office by law for a number of purposes Moreover, the Vice President has been named by each of the recent Presidents . . . to carry out significant Executive duties In light of these precedents, the Vice President has now assumed a particular place in Government in which his status may be characterized as Legislative or Executive depending on the context . . .”).

Many modern scholars have reached largely the same conclusion—that the Vice President is part of both political branches—but they have done so with little explanation. Michael Nelson, the rapporteur for the Twentieth Century Fund Task Force on the Vice Presidency, has written that the office's “hybrid status was bound to make it suspect in legislative councils because it was partly executive and in executive councils because it was partly legislative.” Nelson, *supra* note 2, at 27. Perhaps the leading authority on presidential succession is John Feerick, who has written of the vice presidency: “His was a unique office, neither strictly legislative nor executive but combining functions of both.” FEERICK, *supra* note 2, at 63. Akhil Reed Amar, who, among other things, is an authority on the vice presidency, has written that the Vice President “is neither the President nor a cabinet or subcabinet official wholly within the executive branch. Constitutionally, he is also an officer of the legislature.” Akhil Reed Amar, *Cheney, Enron, and the Constitution*, TIME, Feb. 2, 2002, available at <http://www.time.com/time/nation/article/0,8599,198829,00.html>. *See also* Linda Dudik Guerrero, *John Adams' Vice Presidency, 1789–1797: The Neglected Man in the Forgotten Office, 184–85* (1978) (unpublished Ph.D. dissertation, University of California, Santa Barbara) (“By the Constitution, the vice-president's

Vice President is performing his Senate duties, such as presiding over the chamber, he is part of the legislative branch. When he is carrying out activities, such as those delegated to him by the President, by the Twenty-Fifth Amendment or by statute, he is part of the executive branch. In this respect, the Vice President is a constitutional chameleon. His constitutional colors change depending on the backdrop.

This first article in the two-part series will focus on what might be characterized as more traditional means of legal analysis: text, structure, the views of the original Framers⁸ and judicial dicta. The companion piece will evaluate historical practice, examine the opinions of past vice presidents and other authorities over time and address counterarguments. Ultimately, the two pieces together conclude that the Vice President formally occupies a position

position in the government is ambiguous. He is in the legislative branch due to his position as President of the Senate. Yet he is also within the executive sphere since he is the constitutional successor to the chief executive.”); DANIEL WIRLS & STEPHEN WIRLS, *THE INVENTION OF THE UNITED STATES SENATE* 142–43 (2004) (“[T]he vice presidency . . . [is] an office that actually straddled the division between the Senate and the executive.”); HERBERT L. ABRAMS, “THE PRESIDENT HAS BEEN SHOT”: CONFUSION, DISABILITY, AND THE 25TH AMENDMENT IN THE AFTERMATH OF THE ATTEMPTED ASSASSINATION OF RONALD REAGAN 325 n.14 (1992) (“Although for most practical purposes the vice-president is part of the executive branch, one could argue . . . that the vice-president is really part of the legislative branch, because his only ongoing role is to preside over the Senate.”); MARIE NATOLI, *AMERICAN PRINCE, AMERICAN PAUPER, THE CONTEMPORARY VICE PRESIDENT IN PERSPECTIVE* 8 (1985) (describing the Vice President as “[s]traddling the executive and legislative branches”); PAUL C. LIGHT, *VICE-PRESIDENTIAL POWER: ADVICE AND INFLUENCE IN THE WHITE HOUSE* 7 (1984) (“In theory, the Vice-President’s position as the only constitutional officer with both legislative and executive roots could be a source of power.”); *cf.* Goldstein, *supra* note 4, at 508 (“The founders created . . . a constitutional anomaly located somewhere between the legislative and the executive branches but not entirely welcome at either address.”); Bradley H. Patterson, *Vice President, in ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY* 462 (Michael A. Genovese ed., 2004) (“The vice presidency, as designed then and as it exists today, is an unusual office in that it has its place in both the legislative and executive branches . . .”).

Jonathan Greenberg argues that the Vice President is “two branched.” *See* Greenberg, *supra* note 3, at xv, 229. Greenberg does not, however, explain if the Vice President is part of both political branches simultaneously or not. This article contends that the Vice President can only be part of one branch at a time. In addition, Greenberg essentially contends that the office did not become part of both elected branches until the vice presidency of John Nance Garner. *See id.* at 229. This article contends that the Vice President has had ties to both political branches from the beginning of the Constitution, but that the office has gradually become more and more a part of the executive branch over time, especially since World War I.

This article’s thesis reflects a modification of the author’s brief treatment of the question in a footnote of a prior work. In that piece, the author posited a strictly functional test to determine the Vice President’s location within U.S. constitutional structure. *See* Roy E. Brownell II, *Vice Presidential Secrecy: A Study in Comparative Constitutional Privilege and Historical Development*, 84 ST. JOHN’S L. REV. 423, 497–500 n.323 (2010). This article argues for a broader contextual approach to determining the Vice President’s placement.

8. “Original” denotes Framers of the original Constitution as opposed to subsequent amendments which have affected the vice presidency. Discussion of the views of the Framers of the Twelfth and Twenty-Fifth Amendments appears in the companion to this article. *See* Brownell, *supra* note 5.

in both the legislative and executive branches, though not in both simultaneously. As a practical matter, the modern Vice President is primarily an executive branch officeholder, since that is where he spends the bulk of his professional time.⁹ On a broader level, the vice presidency represents one of the more striking examples of the Framers' break with the pure theory of separation of powers.¹⁰

This piece will begin by examining some threshold questions, first by outlining four different ways the doctrine of separation of powers can be viewed as having been applied to the U.S. Constitution. This analysis lays the foundation for the overall discussion by showing the broader context in which the Vice President operates with regard to the structure of American government. Next, this article turns to reviewing the factors that help determine what branch an official is in and why such a determination is important. Since no agreed upon test exists to make such an evaluation, a variety of legal methodologies will be brought to bear on the question: constitutional text and structure, the opinions of the Framers, judicial dicta, perceptions of the office holders themselves and the views of other prominent federal officials. The two articles together will address each of these variables in turn to see how they relate to determining the backdrop against which the Vice President takes action, and consequently the legal status of the vice presidency within American national government.

II. THRESHOLD CONSIDERATIONS

A. *Four Different Ways to View the American System of Separation of Powers*

As applied to the U.S. Constitution, the doctrine of separation of powers can be seen through four different lenses.¹¹ They are : 1) constitutional personnel; 2) functional powers; 3) branches of government; and 4) the first three articles of the Constitution. These viewpoints often overlap, but not always. They are closely related but not interchangeable. As such, they tend to be easily confused, a problem that is particularly manifest with respect to the

9. This, of course, does not preclude the Vice President from becoming once again predominantly a legislative branch official should political events so dictate. This issue will be taken up in the companion to this article. *See id.*; *infra* notes 434–35 and accompanying text.

10. *See, e.g.*, LEVINSON, *supra* note 2; *compare* Figure No. 1 with Figure No. 2. The term “pure doctrine” of separation of powers comes from M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 13 (1967).

11. *See, e.g.*, M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1165 (2000) (“The first three articles of the Constitution institute a separation-of-powers system by identifying three types of governmental power, allocating them to three different departments, and providing for separation of personnel among the departments.”). Others have focused on three of these perspectives. *See, e.g.*, VILE, *supra* note 10, at 14–17 (noting separation of institutions, functional powers, and persons); WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 9 (1992) (noting functional powers, articles and institutions).

vice presidency. Indeed, this confusion contributes in no small measure to the longstanding failure to properly analyze the placement of the vice presidency within the structure of the American Constitution.

Some broad definitions are in order. “Functional power” writ large will be defined as one of the three categories of political power as generally understood at the time of the framing of the Constitution: legislative, executive and judicial. Thus, functional legislative power will be broadly defined as the power to make, repeal and modify laws.¹² Functional executive power, perhaps the most challenging of the three to delimit, will be broadly defined as the authority to carry into effect enacted laws,¹³ to conduct foreign and military affairs,¹⁴ to appoint officials¹⁵ and to pardon those convicted of crimes.¹⁶

12. See, e.g., JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 189 (1689) (Mark Goldie ed., 1997) (“[T]he legislative power is . . . power to make laws.”); MONTESQUIEU, *THE SPIRIT OF THE LAWS* 156 (1748) (Anne M. Cohler et. al eds. & trans., 1984) (“[L]egislative power . . . makes laws for a time or for always and corrects or abrogates those that have been made.”); 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 142–43 (1765) (Stanley N. Katz ed., 1979) (explaining that the legislative power is that “of *making* . . . the laws”); J.L. DELOLME, *THE CONSTITUTION OF ENGLAND* 61 (Jean-Pierre Machelon repr. ed., 1979) (1807) (“[T]he legislative power . . . is . . . the power of establishing laws, and of abrogating, changing, or explaining them.”).

13. See, e.g., LOCKE, *supra* note 12, at 190 (Executive power includes “the execution of the municipal laws of the society within itself, upon all that are parts of it.”); 1 BLACKSTONE, *supra* note 12, at 257 (“[T]he kingdom hath entrusted him [the king] with the whole executive power of the laws, [though] it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust.”); *id.* at 258–59 (“[T]he public . . . has delegated all it’s power and rights, with regard to the execution of the laws, to one visible magistrate [the king] He is therefore the proper person to prosecute for all public offences and breaches of the peace.”); DELOLME, *supra* note 12, at 70–71 (“[T]he king remains charged with the execution of” the laws).

14. See, e.g., LOCKE, *supra* note 12, at 189–90 (“[F]ederative power,” which is “hardly to be separated” from executive power, includes “the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the commonwealth,” involving “the management of the security and interest of the public without.”); MONTESQUIEU, *supra* note 12, at 157 (“[E]xecutive authority involves . . . “mak[ing] peace or war, send[ing] or receiv[ing] embassies, establish[ing] security, and prevent[ing] invasions.”); 1 BLACKSTONE, *supra* note 12, at 249–50 (“[T]he king has . . . the sole prerogative of making war and peace.”); *id.* at 254 (“[T]he king is considered . . . as the generalissimo, or the first in military command, within the kingdom.”); *id.* at 245 (“The king . . . has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home.”); DELOLME, *supra* note 12, at 72–73 (“He is, in right of his crown, the generalissimo of all sea and land forces He is, with regard to foreign nations, the representative and the depository of all the power and collective majesty of the nation: he sends and receives ambassadors; he contracts alliances; and has the prerogative of declaring war, and of making peace, on whatever conditions he thinks proper.”). Some have questioned whether eighteenth-century notions of executive power included foreign and military affairs. See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004). Even these authorities, however, are quick to hedge their position. See *id.* at 560–71. See also MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 65, 402 n.47 (2007). Moreover, they leave open the question, if foreign and military affairs did not inhere in eighteenth-century notions of executive power, where among the trinity of functional powers did foreign and military affairs belong?

15. See 1 BLACKSTONE, *supra* note 12, at 223 (“Privy counsellors are *made* by the king’s

Finally, functional judicial power will be broadly defined as the power of adjudicating legal disputes.¹⁷ Admittedly, defining functional powers is difficult,¹⁸ but the definitions provided above are general in nature and far from unorthodox.¹⁹

These four different perspectives on separation of powers under the U.S. Constitution—constitutional personnel, functional powers, branches of government and the initial three articles of the Constitution—often match up so effortlessly they appear tautological. For example, when nominating someone

nomination.”); *id.* at 262 (“[H]onours are in the disposal of the king, offices ought to be so likewise; and as the king may create new titles, so may he create new offices.”); *id.* at 259 (The judiciary is composed of “a peculiar body of men, nominated . . . by the crown.”); DELOLME, *supra* note 12, at 72 (The king “appoints the bishops, and the two archbishops.”); *id.* at 76 (The king “can bestow places and employments.”).

16. *See, e.g.*, LOCKE, *supra* note 12, at 198 (“the ruler should have a power, in many cases, to mitigate the severity of the law, and pardon some offenders”); MONTESQUIEU, *supra* note 12, at 94–95 (“Clemency is the distinctive quality of monarchs . . . it is almost always a fortunate thing for them [monarchs] to have occasion to exercise [clemency].”); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 390–91 (1765) (Stanley N. Katz ed., 1979) (The “magistrate . . . has it in his power to extend mercy, wherever he thinks it is deserved [T]he king may pardon all offences merely against the crown, or the public” with certain exceptions); DELOLME, *supra* note 12, at 72 (The king “can pardon offences, that is, remit the punishment that has been awarded in consequence of his prosecution.”).

17. *See, e.g.*, MONTESQUIEU, *supra* note 12, at 157 (defining “the power of judging” as the authority to “punish[] crimes or judge[] disputes between individuals”); 1 BLACKSTONE, *supra* note 12, at 259 (terming “the judicial power” to include “administration of common justice”); DELOLME, *supra* note 12, at 184 (“[J]udicial power . . . is to dispose . . . of the property, honour, and life of individuals.”).

18. *See, e.g.*, THE FEDERALIST NO. 37, at 179 (Madison) (Garry Wills ed., 1982) (“Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary; or even the privileges and powers of the different Legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.”). *See also* William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263 (1989). That said, difficulty in definition has not deterred public officials and commentators from regularly applying such terms. *See, e.g.*, 1 ANNALS OF CONG. 481 (1789) (Madison) (“The Constitution affirms, that the executive power shall be vested in the President. *Are there exceptions to this proposition?* Yes, there are. The constitution says, that in appointing to office, the Senate shall be associated with the President, unless in the case of inferior officers, when the law shall otherwise direct.”) (emphasis added). *See also* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 341–42 (2002). For further discussion of the challenges of line-drawing among functional powers, *see* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 608–26, 656 (2001).

19. *See, e.g.*, RAMSEY, *supra* note 14, at 61–65; JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 12–13 (2009); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 39 n.** (2d ed. 1996); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1948, at 4 (1948 3d ed.); *supra* notes 12–17; *cf.* W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION 29, 90, 103, 134–35 (1965); Magill, *supra* note 11, at 1173; *infra* notes 35, 39, 43, 45, 59 and accompanying text.

for a governmental position, the President²⁰ exercises functional executive power²¹ in the executive branch²² under authority of Article II.²³ When passing a bill, members of Congress²⁴ exercise functional legislative power²⁵ in the legislative branch²⁶ under authority of Article I.²⁷ When considering cases and controversies, federal judges²⁸ exercise functional judicial power²⁹ in the judicial branch³⁰ under authority of Article III.³¹ As intuitive as these examples are, they do not reflect the whole story, however. That is because the Framers did not create a pure system of separation of powers.³² Had they done so, these four different perspectives on separation of powers would be reflected as they appear in Figure No. 1. As will be demonstrated, this conception of separation of powers in America is simply inaccurate, and the vice presidency helps to bear that out.³³

20. See U.S. CONST. art. II, § 2, cl. 2 (“[H]e shall nominate . . . Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.”) (emphasis added).

21. See *supra* note 15 and accompanying text.

22. See U.S. CONST. art. II, § 2, cl. 2; *Mississippi v. Johnson*, 71 U.S. 475, 500 (1866) (“[T]he President is the executive department.”).

23. See U.S. CONST. art. II, § 2, cl. 2.

24. See *id.* art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States”); *infra* note 72. See also *id.* art. I, § 7.

25. See *supra* note 12 and accompanying text.

26. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”) (emphasis added); *Graham County Soil and Water Conservation Dist. v. United States*, 559 U.S. 280, 287 (2010) (“Congress is the Legislative Branch of the Federal Government”); *Johnson*, 71 U.S. at 500 (“The Congress is the legislative department of the government”); *Shrum v. Coweta*, 449 F.3d 1132, 1140 (10th Cir. 2006) (“Congress is the legislative branch”).

27. See U.S. CONST. art. I, § 1. See also *id.* art. I, § 7.

28. See *id.* art. III, § 1 (“The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”) (emphases added).

29. See *supra* note 17 and accompanying text.

30. See U.S. CONST. art. III, § 1 (“The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”) (emphasis added).

31. See *id.*

32. See, e.g., RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 29 (1991) (The Constitution provides “a government of separated institutions *sharing* powers.”); ANDREW E. BUSCH, *HORSES IN MIDSTREAM: U.S. MIDTERM ELECTIONS AND THEIR CONSEQUENCES* 8 (1999) (Under the American Constitution, “the legislative and executive branches . . . share in the exercise of some of the powers of the other . . . the executive’s veto gave him a share of the legislative power, while congressional war declaration and Senate powers over appointment and treaties gave the legislative branch a share of powers previously thought to be purely executive in nature.”). See also LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* (1998); LEVINSON, *supra* note 2.

33. See, e.g., 1 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 204 (repr. ed. 1960) (The Vice President “was made President of the Senate, despite the obvious violence . . . this assignment did to the theory of the separation of powers.”); JAMES F. BYRNES, *ALL IN ONE LIFETIME* 233 (1958) (“[P]articipation by the Vice President in

FIGURE NO. 1

PURE SEPARATION OF POWERS

<u>Branch</u>	Legislative	Executive	Judicial
<u>Article</u>	Art. I	Art. II	Art. III
<u>Functional Power</u>	Legislative	Executive	Judicial
<u>Constitutional Personnel</u>	Senators and Representatives	President	Judges

As a result of the Framers' handiwork, the tidy alignment of branch, article, functional power and constitutional personnel breaks down upon closer examination. For instance, when providing advice and consent for a nomination,³⁴ members of the Senate are exercising functional executive power³⁵ in the legislative branch³⁶ under authority of Article II.³⁷ When trying

Senate voting . . . constitutes a violation of the spirit of the fundamental provision of the Constitution that the three branches of our government shall forever be separated.”); Gerald Ford, *On the Threshold of the White House: From Gerald Ford*, ATLANTIC MONTHLY, July 1974, available at <http://www.theatlantic.com/past/docs/issues/74jul/fordhumphrey.htm> (With regard to the Vice President, “the Founding Fathers violated their own fundamental rule of separation of powers.”); Marie D. Natoli, *The Vice Presidency Since World War II*, 155 (1975) (unpublished Ph.D. dissertation, Tufts University) (“[T]he Constitutional position of the Vice President is . . . a breach of the doctrine [of separation of powers].”); LEVINSON, *supra* note 2.

34. See U.S. CONST. art. II, § 2, cl. 2.

35. See, e.g., *Wallace v. United States*, 258 U.S. 296, 298 (1922) (“The Senate in confirming nominations is not exercising a judicial but an executive function.”); *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880) (“[T]he Senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties.”); George Washington to Senate Committee on Treaties and Nominations (Aug. 10, 1789), available at http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s12.html [hereinafter *Washington letter*] (“In the appointment to offices, the agency of the Senate is purely executive”); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 522–23 (Max Farrand ed., 1966) [hereinafter 2 FARRAND] (Wilson) (“[T]he Senat[ors] . . . are to make Treaties . . . they are to try all impeachments . . . to make the Executive & Judiciary appointments [Thus] the Legislative, Executive & Judiciary powers are all blended in one branch of the Government.”); 1 ANNALS OF CONG. 481 (1789) (Madison) (“The Constitution affirms, that the executive power shall be vested in the President. *Are there exceptions to this proposition?* Yes, there are. The constitution says, that in appointing to office, the Senate shall be associated with the President, unless in the case of inferior officers, when the law shall otherwise direct.”) (emphasis added); Thomas Jefferson, *Opinion on Powers of the Senate respecting Diplomatic Appointments* (Apr.

impeachments,³⁸ members of the Senate are exercising functional judicial power³⁹ in the legislative branch⁴⁰ under authority of Article I.⁴¹ Similarly,

24, 1790), available at http://press-pubs.uchicago.edu/founders/print_documents/a2_2_2-3s48.html (“The Constitution has divided the powers of government into three branches, Legislative, Executive and Judiciary, lodging each with a distinct magistracy [I]t has declared that ‘the Executive powers shall be vested in the President,’ submitting only special articles of it to a negative by the Senate”); 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 466 (Merrill Jensen ed., 1976) (statement of William Findley: “[o]nly a part of the executive power is vested in the President. The most influential part is in the Senate.”); HENRY CABOT LODGE, THE SENATE OF THE UNITED STATES AND OTHER ESSAYS AND ADDRESSES HISTORICAL AND LITERARY 9 (1921) (“The Senate shares with the President the executive functions [of appointments and treaty making].”); LINDSAY ROGERS, THE AMERICAN SENATE 12–13 (repr. ed. 1968) (1926) (“The Constitution . . . conferred on the upper chamber certain special functions of an executive and judicial character: confirmation of appointments, ratification [sic] of treaties, and the trial of impeachments.”); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 137 (3d ed. 2000) (“[T]he Senate’s ‘Advice and Consent’ role in the appointment of executive officials would seem to be a form of executive power as that concept is normally understood.”); WIRLS & WIRLS, *supra* note 7, at 9 (“[T]he Senate was placed at the crossroads of the system of separated institutions sharing power. The Senate was to . . . share in the executive power of appointments and treaties.”); ROBERT LUCE, LEGISLATIVE PROBLEMS: DEVELOPMENT, STATUS, AND TREND OF THE TREATMENT AND EXERCISE OF LAWMAKING POWERS 128 (1935) (referring to the Framers “giving the Senate a[] part . . . [of] the executive function of choosing” judges); JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE 14 (1953) (“The exercise of the appointing power is essentially an executive function; in passing upon the nominations of the President the Senate is performing an executive function which has been vested in it by the Constitution.”); ROBERT C. BYRD, THE SENATE: GREAT FORUM OF CONSTITUTIONAL LIBERTY 16 (2011) (“The Senate was a body in which legislative, executive, and judicial powers would be combined.”); Brownell, *supra* note 5, at Part III.C.1; *cf.* CLARA HANNAH KERR, THE ORIGIN AND DEVELOPMENT OF THE UNITED STATES SENATE 135 (1895) (“[T]reaties were regarded as part of the executive duties of the senate.”).

36. See *supra* note 26. The Senate is not part of the executive branch when considering nominees even though it is exercising functional executive power. If the Senate were part of the executive branch in this setting, the chamber would have to automatically approve presidential nominees; otherwise, it would violate the clear intention of the Framers to create a unified executive branch and to reject a plural executive. If the Senate were part of the judiciary during impeachment trials when it is exercising functional judicial authority, it would mean that the Senate’s judgment could be appealed through the Article III court system, which it cannot. See *Nixon v. United States*, 506 U.S. 224 (1993).

37. See U.S. CONST. at art. II, § 2, cl. 2.

38. See *id.* art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”).

39. See *id.* art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”) (emphasis added); *Kilbourn*, 103 U.S. at 191 (“The Senate also exercises the judicial power of trying impeachments, and the House of preferring articles of impeachment.”); *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1446 (11th Cir. 1987) (“If the House approves and transmits articles of impeachment, the Senate must exercise its judicial power and convene as a court of impeachment. The Senate must then sit as judges and jurors to hear such evidence as is admissible and arguments as are made to decide the case.”); 2 FARRAND, *supra* note 35; Brownell, *supra* note 5, at Part III.C.1.

40. See *supra* note 26.

41. See U.S. CONST. art. I, § 3, cl. 6. Impeachment is mentioned in other parts of the

when signing or vetoing legislation,⁴² the President is exercising functional legislative power⁴³ under authority of Article I,⁴⁴ but he is certainly not considered part of the legislative branch while doing so.⁴⁵ These deviations from the pure doctrine of separation of powers are borne out in Figure No. 2 below.⁴⁶

Constitution but the power is assigned to Congress in Article I.

42. *See id.* art. I, § 7.

43. *See, e.g.,* *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 453 (1899) (“Undoubtedly the President, when approving bills passed by Congress, may be said to participate in the enactment of laws which the Constitution requires him to execute . . . [a]s the Constitution . . . authorize[s] the President to perform certain functions of a limited number that are legislative in their general nature.”); *Clinton v. New York*, 524 U.S. 417, 438 (1998) (“Both Article I and Article II assign responsibilities to the President that directly relate to the lawmaking process.”); *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (“The President is a participant in the lawmaking process by virtue of his authority to veto bills enacted by Congress.”); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) (“The Executive, except for recommendation and veto, has no legislative power.”); NEUSTADT, *supra* note 32 (quoting President Eisenhower in the context of the veto power: “I am part of the legislative process.”); WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 14–15 (1916) (“The President has both legislative and executive power The character of the veto is purely legislative The author expresses the opinion that the veto is the result of the shrinking of what was once a broad affirmative legislative function of the King.”); Alben W. Barkley, *President and—Not vs.—Congress*, N.Y. TIMES, June 20, 1949, at 14 (“[T]he President . . . by the Constitution, [is] made a part of the legislative process by the requirement that he inform Congress, from time to time, on the State of the Union, recommend legislation, and approve or disapprove measures passed and sent to him by Congress.”); *cf. Smiley v. Holm*, 285 U.S. 355, 373 (1932) (noting that “the veto power of the governor” is an example of “the lawmaking power”).

44. *See* U.S. CONST. art. I, § 7.

45. *See, e.g.,* *Edwards v. United States*, 286 U.S. 482, 490 (1932) (“The President acts legislatively under the Constitution, but he is not a constituent part of the Congress.”). In this vein, Section 1 of Article I provides that “Congress . . . shall consist of a Senate and House of Representatives.” U.S. CONST. art. I, § 1. There is no mention of the President. This is unlike the British “parliament [which] consist[s] of king, lords, and commons” 1 BLACKSTONE, *supra* note 12, at 143. *See also* 6 JOHN QUINCY ADAMS, *MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848*, at 380 (Charles Francis Adams ed., repr. ed. 1969) (“[T]he [lawmaking] principles [in Britain and the United States] were different. The King was a constituent part of Parliament, and no Act of Parliament could be valid without the King’s approbation. But the President is not a constituent part of Congress, and an Act of Congress may be valid as law without his signature or assent.”); Theodore W. Dwight, *Presidential Inability*, 133 N. AM. REV. 436, 441 (1881) (“The King [of Britain] is, himself, a necessary element in constituting a Parliament. This is not true of the President in his relations to Congress.”); VILE, *supra* note 10, at 66 (“[T]he Constitution gave the President a share of the legislative function without his being in the legislature.”); *cf. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION* 8 (2d ed. 2004) (“[Congressional] [f]unctions to be given special attention are those of legislating, overseeing the executive, expressing public opinion, and servicing constituents. . . . Indeed the very term *legislature* is an unfortunate one because it confuses structure and function.”).

46. This diagram reflects textually assigned, functional constitutional powers. At the sub-constitutional level, each branch of government carries out all three functional powers pursuant to statute (e.g., the legislative branch executes the laws that govern it). *Cf. Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72

FIGURE NO. 2**SEPARATION OF POWERS AS APPLIED IN THE CONSTITUTION**

<u>Branch</u>	Legislative	Executive	Judicial
<u>Articles</u>	Art. I, ⁴⁷ Art. II, ⁴⁸ Art. III ⁴⁹	Art. I, ⁵⁰ Art. II	Art. III
<u>Functional Power</u> ⁵²	Legislative Executive ⁵³ Judicial ⁵⁶	Executive ⁵¹ Legislative ⁵⁴	Judicial Executive ⁵⁵
<u>Constitutional Personnel</u> ⁵⁷	Senators, Representatives Vice President ⁵⁸ Chief Justice ⁶⁰	President Vice President ⁵⁹	Judges

CORNELL L. REV. 488, 492–93, 500 (1987).

47. Congress also derives authority from other parts of the Constitution, such as Articles IV and V and various constitutional amendments.

48. The Senate acts under authority of Article II when it considers giving advice and consent to treaties and nominations. *See* U.S. CONST. art. II, § 2, cl. 2. Congress as a whole acts under authority of Article II when it authorizes inferior officer appointments. *See id.*

49. Congress acts under authority of Article III when it defines the jurisdiction of, and rules for, the federal courts. *See id.* art. III, § 2. It also can define punishment for treason, *see id.* art. III, § 3, cl. 2, and fix the location for certain criminal trials. *See id.* at § 2, cl. 3.

50. The President acts under Article I when signing or vetoing legislation. *See id.* art. I, § 7, cls. 2, 3.

51. The executive branch also derives functional executive authority from the Twenty-Fifth Amendment. *See, e.g., infra* note 59.

52. In this chart, functional powers are based on express constitutional provisions, not powers drawn from case law, past practice or otherwise. So, for example, authority to conduct congressional investigations—which is functionally executive or even arguably judicial—is not included.

53. The Senate exercises functional executive power when considering treaties and nominations. *See supra* notes 14, 15, 35. Congress as a whole does so when providing authority for inferior officer appointments; declaring war; granting letters of marque and reprisal; establishing rules on captures and rules for the military and militia; participating in determination of presidential inability; and pardoning rebels under the Fourteenth Amendment. *See, e.g., supra* notes 14–16.

54. The President exercises functional legislative authority when signing or vetoing legislation, giving legislative recommendations and presenting the State of the Union. *See supra* notes 12, 43.

55. The judiciary would appear to exercise functional executive power when appointing inferior officers and arguably when ruling on matters involved with the treaty power. *See supra* notes 14, 15.

56. The Senate exercises functional judicial power when holding impeachment trials. *See supra* notes 17, 39. Congress does so when creating lower federal courts and establishing the place for certain criminal trials; for judging the elections and qualifications of its own members;

Thus, as can be seen in Figure No. 2, the drafters of the Constitution put forward three separate, consecutive articles to roughly reflect three branches of government, but they also created partially overlapping functional powers and personnel.⁶¹ To a great extent, the Framers' departures from the pure doctrine of separation of powers⁶² reflected their desire to ensure checks and balances.⁶³ This overlap of articles, branches, functional powers and personnel under the Constitution is nowhere better manifested than in the vice presidency.

As will be discussed more thoroughly in the companion to this piece, the vice presidency reflects the four aspects of separation of powers at some of their most complex, and as such reveals some important and underexamined

and for "punish[ing] its Members for disorderly Behaviour." U.S. CONST. art. I, § 5, cl. 2; *supra* note 17.

57. This term is defined as encompassing the President, Vice President, federal lawmakers and federal judges.

58. The Vice President falls within the legislative branch when serving as President of the Senate, casting tiebreaking votes in the upper chamber and presiding over the counting of electoral votes.

59. The Vice President falls within the executive branch when carrying out duties delegated by the President and when participating in the determination of presidential inability under the Twenty-Fifth Amendment. *Cf.* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 98 n.231 (1994) ("Nothing in the Constitution commits any part of the executive power to the President's subordinates, except in two cases: when Congress vests the appointment of inferior officers in the heads of departments . . . and when 'the Vice President and a majority of . . . the principal officers of the executive departments' certify that 'the President is unable to discharge the powers and duties of his office.'"); Adam R.F. Gustafson, Note, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL'Y REV. 459, 476 (2009) ("The power Section 4 grants to the Vice President and Cabinet . . . is an exception to the Constitution's otherwise nearly exclusive grant of executive power to the President."). The Vice President's Twenty-Fifth Amendment power would be considered a derivative of the functional executive power of appointment. *See supra* notes 15, 35.

Even before the Twenty-Fifth Amendment, the Vice President arguably enjoyed functional executive authority to decide questions of presidential inability. *See* Herbert Brownell, Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 YALE L.J. 189, 204 (1958). This purported authority never seems to have been asserted by vice presidents and was never exercised.

60. The Chief Justice serves in the legislative branch when sitting as President of the Senate during the impeachment trial of the President. *See* Steven G. Calabresi & Joan Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel*, 79 CORNELL L. REV. 1045, 1123–24 n.384 (1994); Roy E. Brownell II, *When the Chief Justice Serves in the Legislative Branch*, 3 AKRON J. CONST. L. & PUB. POL'Y 31 (2012); *cf.* David Y. Thomas, *The Law of Impeachment in the United States*, 2 AM. POL. SCI. REV. 378, 395 (1908).

61. *See, e.g.*, NEUSTADT, *supra* note 32, at 29; Calabresi & Larsen, *supra* note 60, at 1047. Separation of powers is not manifested in the U.S. Constitution solely by the first three articles, however. The Incompatibility Clause also provides a means of separation. The author would like to thank Seth Barrett Tillman for his thoughts on this issue.

62. *Cf.* Kilbourn v. Thompson, 103 U.S. 168, 191 (1880) ("*In the main*, [the Constitution] . . . has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government.") (emphasis added).

63. *See, e.g.*, VILE, *supra* note 10, at 156; Magill, *supra* note 11, at 1132.

principles of separation of powers at the federal level.⁶⁴ The Vice President, depending on the context, exercises functional legislative, executive or judicial powers; exists in either the legislative or executive branch of government; and depending on the context, acts under authority of Article I, the Twelfth Amendment or the Twenty-Fifth Amendment. Consider the Vice President casting a tiebreaking vote on a bill. In so doing, the Vice President is carrying out functional legislative power inside the legislative branch under Article I.⁶⁵ By contrast, when signing or vetoing legislation, the President is exercising functional legislative power within the *executive* branch under authority of Article I.⁶⁶ Keeping in mind these four different viewpoints with respect to separation of powers is important to avoid conceptual pitfalls when analyzing the placement of the vice presidency.

B. Factors for Determining Which Branch an Official is in

Much as the Constitution assigns functional powers that transcend branches of government, the charter also assigns two officeholders to more than one branch. The Vice President is one such official.⁶⁷ In determining which branch or branches an official is in, a threshold inquiry is what defines whether an official is “in,”⁶⁸ or “part of” a branch. There is no agreed-upon test for making such a determination.⁶⁹ Therefore, one must consult all legal

64. *Cf.* Greenberg, *supra* note 3, at 32–33.

65. *See* Brownell, *supra* note 5, at Part III.C.1.

66. *See id.*

67. The other is the Chief Justice under rare and very limited circumstances. *See* Brownell, *supra* note 60.

68. For purposes of this article and as it relates to the Vice President’s location within the federal government, the terms “in,” “within,” “resides,” “links to,” “part of,” “ties to,” and the like should be viewed as synonymous.

69. *See* Memorandum from Nicholas deB. Katzenbach, Assistant Attorney General for the Office of Legal Counsel, to the Vice President, Delegation of Presidential Powers, at 1 (June 22, 1961), available at <http://www.fas.org/irp/agency/doj/olc/062261.pdf> (“[T]here has been no judicial test [devised as to] . . . the extent to which he [the Vice President] may properly be regarded as an officer within the executive branch.”).

Judicial treatment of how to categorize statutory positions within the American tripartite system of government yields a number of competing approaches. Roughly speaking they include: (1) an accountability/control test, *see, e.g.*, *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 36 n.1 (1985) (“Marshals are within the Executive Branch of the Federal Government [since they are] . . . subject to the supervision and direction of the Attorney General . . . [and are] funded through Department of Justice appropriations.”); *Freytag v. Comm’r*, 501 U.S. 868, 891 (1991) (“The Tax Court remains independent of the Executive and Legislative Branches. Its decisions are not subject to review by either the Congress or the President. Nor has Congress made Tax Court decisions subject to review in the federal district courts.”); *Mistretta v. United States*, 488 U.S. 361, 423 (1989) (Scalia, J., dissenting) (“It would seem logical to decide the question of which Branch an agency belongs to on the basis of who controls its actions: if Congress, the Legislative Branch; if the President, the Executive Branch; if the courts (or perhaps the judges), the Judicial Branch.”); (2) a functional test, *see, e.g.*, *Freytag*, 501 U.S. at 890 (“[W]e now examine the Tax Court’s functions to define its constitutional status and its role in the constitutional scheme.”); *cf.* *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 628 (1935) (“To

analytical tools: constitutional text and structure; case law; the views of the Framers; and past practice and opinion. While none of these methodologies on its own yields a dispositive answer, taken together they supply valuable

the extent that it [the Federal Trade Commission] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its *quasi*-legislative or *quasi*-judicial powers, or as an agency of the legislative or judicial departments of the government.”); *Bowsher v. Synar*, 478 U.S. 714, 749 (1986) (Stevens, J., concurring) (“[O]ur cases demonstrate [that] a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned.”); (3) an appointments test, *see Fed. Mar. Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 773 (2002) (Breyer, J., dissenting) (“[A]gencies, even ‘independent’ agencies, are more appropriately considered to be part of the Executive Branch The President appoints their chief administrators, typically a Chairman and Commissioners, subject to confirmation by the Senate.”); and (4) a personnel test, *see Freytag*, 501 U.S. at 911 (Scalia, J., concurring) (“[I]t is the identity of the officer—not something intrinsic about the mode of decisionmaking or type of decision—that tells us whether the judicial power is being exercised.”).

None of these tests is dispositive for categorizing the Vice President. First, he is a creature of the Constitution and not of statute. As a result, the accountability/control test does not easily apply to him just as it does not to other federally elected officials. Like the President and members of Congress, the Vice President is directly accountable to the public. For activities delegated to him by the President and the Senate, he is accountable in the sense that the delegation can be rescinded. But the ultimate professional sanction—removal—is not available to either the President or the Senate acting on its own. The Vice President is independent from the President and, constitutionally, cannot be controlled by him. For a more detailed discussion of his independence, *see Roy E. Brownell II, The Independence of the Vice Presidency*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 297 (2014) [hereinafter Brownell, *Independence*]. Thus, the accountability test does not apply to the Vice President.

Second, the functional test has limitations for several reasons. Foremost among them is that the test is premised on the assumption that functional power and branches of government are one and the same. As has been demonstrated, they are not. *See, e.g., supra* Part II.A. The Vice President exercises all three types of functional power. He exercises functional legislative power when he presides over the Senate and breaks ties while the body is considering bills and resolutions. He exercises functional executive power when he presides over the Senate while the body is in executive session (e.g., considering appointments and treaties); when he carries out duties delegated to him by the President (e.g., meeting with foreign leaders); and when he takes action under Section 4 of the Twenty-Fifth Amendment to work with the Cabinet to determine presidential inability. And he exercises functional judicial authority when presiding over non-presidential impeachment trials. Thus, a functional test, while a useful criterion to weigh in considering branch membership, is not outcome determinative.

Third, the appointments test is inapposite because the Vice President is not *appointed* by the President—he is popularly elected through the Electoral College. *See* U.S. CONST. amend. XII. Even when chosen under the Twenty-Fifth Amendment, he is nominated by the President and subject to bicameral *confirmation*; he is not “appointed” subject to Senate advice and consent. *See Roy E. Brownell II, Can the President Recess Appoint a Vice President?*, 42 PRESIDENTIAL STUD. Q. 622 (2012) [hereinafter Brownell, *Recess Appointed*].

Finally, the personnel test does not apply because, unlike a judge exercising judicial power, the Vice President does not have what might be termed a default functional power associated with his office. That is to say, under this test, if a judge takes action it is automatically judicial power. If a Vice President takes action, it may be functionally legislative, executive or judicial power. There is no such thing as a separate identifiable vice-presidential functional power. *See also* Figure No. 2 and accompanying notes.

considerations for determining where an official resides within U.S. constitutional structure.

As for textual determinants to use when deciding which branch an official serves in, two indicia stand out. The first is whether the position is described by Article I or Article II. If Article I authorizes the position, then it adds to the likelihood that the officeholder is part of the legislative branch, because that is viewed as the legislative branch article.⁷⁰ By the same token, if Article II maps out the position, it is more likely an executive branch slot, since Article II is seen as the executive branch article.⁷¹ Articles are useful considerations, but, as noted in the previous section, articles do not *necessarily* equate to branch membership.

A second textual indicator is whether there are terms that reflect a linkage to a particular branch. Are terms such as “of” or “in” used in relation to this official and a particular branch? For example, senators and representatives are

70. *See, e.g.,* *Goldwater v. Carter*, 617 F.2d 697, 705 (D.C. Cir. 1979) (per curiam) (“Article I, set[s] forth the powers of the legislative branch.”), *judgment vacated on other grounds*, 444 U.S. 996 (1979); *Schneider v. Kissinger*, 412 F.3d 190, 195 (D.C. Cir. 2005) (“Article I of the Constitution evinces a clear textual allocation to the legislative branch.”); *Bancoult v. McNamara*, 445 F.3d 427, 434 (D.C. Cir. 2006) (quoting *Schneider* with approval: “Article I of the Constitution evinces a clear textual allocation to the legislative branch.”); *Branning v. United States*, 11 Cl. Ct. 136, 139 (1986) (referring to “Article I of the Constitution, the legislative article”); *United States v. Weil*, 29 Ct. Cl. 523, 541 (1894) (referring to “the convention in 1787 . . . framing the legislative article of the Constitution”); REHNQUIST, *supra* note 11 (“Each of the three powers of government—legislative, executive, and judicial—is dealt with in a separate article. Article I grants legislative power to Congress, Article II grants the executive power to the president, and Article III vests the judicial power in the federal courts.”).

As Figure No. 2 indicates, not all functional legislative power is laid out in Article I. For example, Article IV provides Congress the authority to legislate for federal territories, *see* U.S. CONST. art. IV, § 3, cl. 3, and Article V provides Congress with authority to initiate constitutional amendments. *See id.* art. V.

71. *See, e.g.,* *Goldwater*, 617 F.2d at 705 (“Article II of the Constitution, relat[es] to the executive branch”); *In re Sealed Case*, 310 F.3d 717, 731 (FISA Ct. Rev. 2002) (referring to “the province of the Executive Branch (Article II) and the Congress (Article I)”); *Schmit v. ITT Fed. Elec. Intern.*, 986 F.2d 1103, 1108 (7th Cir. 1993) (“The tripartite system is prescribed by Article I of the Constitution, which delimits the powers of the legislature, Article II, which outlines the executive branch, and Article III, which establishes the judiciary.”); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2 (D.D.C. 2002) (“Article II of the Constitution delineat[es] the Executive Branch’s powers.”); *Hastings v. United States*, 802 F. Supp. 490, 496 (D.D.C. 1992) (“Article II . . . deals with the Executive Branch of Government”), *vacated*, 988 F.2d 1280 (1993); REHNQUIST, *supra* note 11; WIRLS & WIRLS, *supra* note 7, at 174–75 (“Article II . . . defines the presidency and its powers.”).

As with functional legislative power, not all functional executive power is provided by Article II. As Figure No. 2 indicates, the power to declare war, for instance, is assigned under Article I. The same is true of issuing letters of marque and reprisal, *see* U.S. CONST. art. I, § 8, cl. 11, and promulgating rules governing the military. *See id.* § 14. Each of these powers was treated as executive power under the British Constitution. *See, e.g.,* 1 BLACKSTONE, *supra* note 12, at 249, 250, 254.

mentioned in text as “members of Congress,”⁷² clearly denoting linkage to the legislative branch.⁷³

In addition to textual considerations, two structural factors merit particular attention. The first is whether the officeholder shares attributes of lawmakers, senior members of the executive branch or federal judges. The President obviously is the head of and part of the executive branch.⁷⁴ Cabinet secretaries are as well.⁷⁵ If the Vice President is part of the executive branch, he would likely share attributes of the President and of Cabinet secretaries. This is because the Vice President is like the President in that he is a nationally elected official whose position is spelled out in the Constitution itself. At the same time, he is also like a Cabinet official in that, when carrying out executive branch functions (other than the Twenty-Fifth Amendment), he is subordinate to the President. A similar inquiry is whether the position in question shares attributes of lawmakers. Members of Congress are, of course, part of the legislative branch.⁷⁶

A second structural factor is the type of functional power the official exercises. Is it functional executive power or functional legislative power? Relevant inquiries might include: Is the official taking part in the formal lawmaking process?⁷⁷ Is the official voting on bills or resolutions?⁷⁸ Is he

72. See U.S. CONST. art. I, § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”) (emphasis added); *id.* amend. XIV, § 3 (referring to “member[s] of Congress”) (emphasis added); *id.* art. I, § 2, cl. 5 (“The House of Representatives shall chuse *their* Speaker.”) (emphasis added); *id.* § 3, cl. 5 (“The Senate shall chuse *their* other Officers, and also a President pro tempore.”) (emphasis added); *id.* amend. XXV, §§ 3, 4 (emphasis added) (referring “to the President pro tempore of the Senate and the Speaker of the House of Representatives”) (emphasis added).

73. See *supra* note 26.

74. See, e.g., *id.* (“[T]he President is the executive department.”); *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (“[T]he President [is] . . . head of the Executive Branch.”); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405 (1928) (“The President [is] . . . the chief of the executive branch.”); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 612 (2007) (making reference to “the President, his staff, and *other* Executive Branch officials.”) (emphasis added); *Davis v. Passman*, 442 U.S. 228, 250 (1979) (Burger, C.J., dissenting) (“In the performance of constitutionally defined functions, each Member of the House or Senate occupies a position *in* the Legislative Branch comparable to that of the President *in* the Executive Branch.”) (emphasis added).

75. See, e.g., U.S. CONST. art. II, § 2, cl. 1 (“He may require the Opinion, in writing, of the principal Officer *in* each of the executive Departments.”) (emphasis added); *id.* amend. XXV, § 4 (Referring to “the principal officers of the executive department”) (emphasis added); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755 (D.C. Cir. 2009) (noting “the heads of cabinet-level departments *within* the executive branch”) (emphasis added); *Barrett v. United States*, 798 F.2d 565, 573 (2d Cir. 1986) (referring to “cabinet and federal agency officials *in* the Executive Branch”) (emphasis added); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913 (4th Cir. 1980) (“The executive branch, contain[s] the State Department, the intelligence agencies, and the military.”).

76. See *supra* notes 72 and 73.

77. See *supra* notes 12 and 43.

78. See, e.g., *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (“[A]cts of voting . . . [are] quintessentially legislative” actions.). See also *supra* Part II.A.

playing a role in the drafting and development of legislation?⁷⁹ Is he taking part in the development, interpretation and application of parliamentary rules of procedure?⁸⁰ Is he taking part in debate and congressional proceedings?⁸¹ If the answer to any of these questions is “yes,” it is likely the official is carrying out functional legislative power, which would incline him toward the legislative branch.

On the other hand, is he exercising functional executive power? Relevant questions in this context might include: Is he implementing the laws?⁸² Is he nominating officials to positions?⁸³ Is he carrying out diplomatic functions?⁸⁴ Is he pardoning individuals?⁸⁵ If the answer to any of these questions is “yes,” he is likely carrying out functional executive power which would incline him toward the executive branch. However, as noted previously, while there is a great deal of overlap between branches of government and functional power, they are not coextensive. Thus, the type of functional power exercised provides helpful clues as to determining which branch of government an official is in,⁸⁶ but it is not dispositive.

In addition to text and structure, another important consideration is how the Framers of the original Constitution and of the relevant amendments saw the position in question. Did they perceive it as part of the executive branch, the legislative branch or both? The words of those who crafted the text itself are vital to understanding its meaning and can therefore provide important evidence as to which branch an official falls within.

79. *See, e.g.*, *EEOC v. CBS, Inc.*, 743 F.2d 969, 972 (2d Cir. 1984) (“It is for Congress, the legislative branch, to write the laws.”).

80. *See, e.g.*, BERNARD SCHWARTZ, *AMERICAN CONSTITUTIONAL LAW* 58 (1955) (“Perhaps the basic privilege of any legislative assembly is that of regulating its own constitution and internal affairs.”).

81. *See, e.g.*, U.S. CONST. art. I, § 6, cl. 1.

82. *See, e.g.*, *Myers v. United States* 272 U.S. 52, 117 (1926) (“The vesting of the executive power in the President was essentially a grant of power to execute the laws.”). *See also supra* note 13.

83. *See, e.g.*, *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (“Not having the power of appointment unless expressly granted or incidental to its powers, the legislature cannot ingraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; though the case might be different if the additional duties were devolved upon an appointee of the executive.”). *See also supra* note 15.

84. *See, e.g.*, *United States v. Curtiss-Wright* 299 U.S. 304, 319 (1936) (“In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.”); *supra* note 14.

85. *See supra* note 16.

86. The Supreme Court has frequently ignored the question of functional power in deciding separation of powers cases. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 393 (1989) (stating that “separation of powers analysis does not turn on the labeling of an activity”); *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (“We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant.”).

As noted earlier, the judiciary has never laid out a definitive formula for determining branch membership for constitutional officials. On occasion, however, courts have made offhanded references to a specific official's status within the constitutional architecture, and these passages are entitled to close attention. Although these offhand references constitute dicta, they are better than no judicial pronouncement at all, and as such, they provide useful contributions to the debate over which branch or branches an official occupies.

Political branch interpretation of an office's constitutional location is also highly valuable. This is especially true in the case of the Vice President, given the lack of definitive judicial treatment of the position.⁸⁷ Have lawmakers viewed the official as part of the legislative branch or the executive? What about presidents? Perhaps most importantly to the question at hand, how have vice presidents themselves viewed the position? All of these officials have sworn to uphold the Constitution, and therefore they need to interpret it.⁸⁸ Consequently, their views warrant close inspection. After all, courts profess to be particularly deferential when an official is interpreting the powers of his own branch of government.⁸⁹

Still another factor to be used in determining which branch an official is in involves practical considerations. Does the officeholder in question take part in the quotidian activities of the branch?⁹⁰ As such, is the official subject to the rules of the branch in question?

At the end of the day, all of this analysis should be informed by efforts to synthesize the seemingly competing strands of legal authority.⁹¹ Any purported solution should not leave heaps of legal authority on the cutting room floor. While there is no single test for determining which branch a constitutional official is in, text, structure, the views of the Framers, judicial dicta, the opinion and actions of public officials and practical concerns all contribute to gaining a proper understanding of where the Vice President resides within American constitutional structure.

C. Why it Matters Which Branch the Vice President is in

The inevitable question then arises: why does it matter which branch or branches the Vice President is in? The answer is it is important for a host of reasons, including: 1) gaining a more refined understanding of the doctrine of separation of powers as applied to American national government; 2)

87. A discussion of political branch interpretation of the vice presidency will take place in the companion to this article. See Brownell, *supra* note 5.

88. See, e.g., LOUIS FISHER, DEFENDING CONGRESS AND THE CONSTITUTION 1 (2011).

89. See, e.g., United States v. Nixon, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.").

90. See, e.g., SCHWARTZ, *supra* note 80, at 58.

91. See *infra* Part III.D.

achieving a proper conceptualization of the vice presidency and the office's historical development; 3) clarifying legal interpretations—constitutional, statutory and regulatory—of the vice presidency; and 4) determining accountability for the Vice President.

First, a proper understanding of where the Vice President fits within American constitutional structure is useful in gaining a more sophisticated understanding of the doctrine of separation of powers as applied to the U.S. Constitution.⁹² As alluded to earlier, a strict and tidy application of separation of powers to the national government would have meant that Article I would cover only functional legislative powers, would apply only to the legislative branch and would provide only for legislative branch personnel; Article II would cover only functional executive powers, would apply only to the executive branch and would provide only for executive branch personnel; and Article III would cover only functional judicial powers, would apply only to the judicial branch and would provide only for judicial branch personnel. The reality, however, is messier, which the vice presidency helps to explain.

Second, resolving the question of the Vice President's placement in the constitutional schema is central to understanding the institution of the vice presidency itself and its historical evolution. To a great extent, the dual-branch nature of the vice presidency accounts for its stunted development in the first century and a quarter under the Constitution.⁹³ Because of the position's bizarre placement, neither political branch took ownership of it, and the office withered on the constitutional vine before slowly rising to prominence after World War I.⁹⁴ Without knowing how the constitutional interpretation of the office has changed, one simply cannot properly understand how the office has been transformed since 1789.⁹⁵ How else could one explain the wholly different vice presidential job descriptions given by John Adams and Joe Biden?

Knowing which branch or branches the Vice President is in also helps remove conceptual roadblocks to better understanding the vice presidency and its relationship to other parts of the federal government. For instance, placing him in both political branches helps explain how the Framers created a unified executive branch,⁹⁶ yet still permitted the Vice President to “defy” the

92. See Greenberg, *supra* note 3, at 32–33. See also *supra* Figure No. 2 and accompanying notes.

93. See, e.g., Nelson, *supra* note 2, at 25, 27; Greenberg, *supra* note 3, at ix, 24, 34; HITE, *supra* note 2, at 197–98; cf. Natoli, *supra* note 33, at 489–90. Other factors in the office's troubled early history include the Twelfth Amendment, the rise of political parties and the evolution of Congress as an institution. See IRVING G. WILLIAMS, *THE AMERICAN VICE-PRESIDENCY: NEW LOOK 1* (1954).

94. See, e.g., Goldstein, *supra* note 4, at 508; Brownell, *supra* note 5.

95. See Greenberg, *supra* note 3, at 33.

96. Use of this term denotes a non-plural executive and should not be confused with the “unitary executive” theory, which is freighted with controversy and is beyond the scope of this article and its companion. See, e.g., JOHN YOO, *THE POWERS OF WAR AND PEACE: THE*

President⁹⁷ and not be removed from his position.⁹⁸ The Vice President being considered partly in the legislative branch helps explain this independence from the President.

Another conceptual problem is whether the Vice President is a “member” of the legislative branch and therefore prevented by the Incompatibility Clause from accepting delegations by the President.⁹⁹ This represents a serious disconnect between the theory and the reality of the position. The Vice President is President of the Senate, but the modern Vice President spends virtually all of his professional time on executive branch matters. Does the Incompatibility Clause apply to the Vice President and therefore mean that all vice presidential actions in the executive branch over the course of American history are unconstitutional? Certainly not. By properly placing the Vice President within both political branches, the apparent dilemma between the Incompatibility Clause and the longstanding practice of presidential delegations to the Vice President is resolved.¹⁰⁰

An additional example of the need for conceptual clarity with respect to the vice presidency involves the Presentment Clause, which defines the federal lawmaking process. If the Vice President is part of the executive branch all of the time, then it poses problems in situations where he breaks a tie, permitting a bill to go to the President for the chief executive’s signature. In this case, the executive branch would get two bites at the lawmaking apple. This would seem to violate the Presentment Clause, which permits the executive branch only one opportunity to accept or reject a measure.¹⁰¹ Similarly, a Vice President, through his tiebreaking vote, can affect the final composition of legislation—his vote on an amendment can delete or add items to a bill. In this way, were the Vice President to be considered part of the executive branch while presiding over the Senate, and therefore be considered the President’s marionette, the President could be seen as exercising a form of line item veto, which is unconstitutional.¹⁰²

Third, knowing where the Vice President falls within the broader governmental structure clarifies stubborn and recurring problems of legal construction involving the office. On the constitutional interpretation side,

CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005); STEVEN G. CALABRESI & CHRISTOPHER S. YOO: THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008).

97. See Brownell, *Independence*, *supra* note 69.

98. See *infra* notes 201–08 and accompanying text (discussing the President’s inability to remove a Vice President.).

99. Cf. Reynolds, *supra* note 4, at 1539–41. Brief mention is also made of this issue in PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 228 n.60 (2009).

100. This matter is taken up in more detail in the companion to this article. See Brownell, *supra* note 5.

101. See *Clinton v. New York*, 524 U.S. 417 (1998).

102. See *id.*

figuring out which branch the Vice President resides in is important in several settings. One issue arises when determining the level of deference to afford the Vice President's confidentiality interests. If he is in the legislative branch, the Vice President's constitutional confidentiality interests could very likely be absolute under the Speech or Debate Clause.¹⁰³ If, on the other hand, he is in the executive branch, those interests are qualified.¹⁰⁴ The standard to apply depends on which branch he is in.

Another potential issue with regard to legal interpretation involves the Vice President's immunity from civil suit for official actions taken. This determination also may vary depending on whether the Vice President is carrying out executive branch or legislative branch functions. If he is in the legislative branch, the Vice President would enjoy absolute civil immunity for his legislative acts.¹⁰⁵ If he is in the executive branch, however, the Vice President may benefit only from qualified immunity.¹⁰⁶

Yet another legal situation displaying the importance of knowing which branch the Vice President is in would involve immunity from civil arrest. If the Vice President were considered part of the legislative branch, he would likely enjoy immunity from civil arrest when in transit to the Senate.¹⁰⁷ Were he in the executive branch, it may be less likely he would enjoy such immunity.¹⁰⁸

103. See Brownell, *supra* note 7, at 629; *cf.* *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660 (D.C. Cir. 2007). *But cf.* *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011).

104. See Brownell, *supra* note 7, at 629; *cf.* *United States v. Nixon*, 418 U.S. 683, 711–14 (1974).

105. See Brownell, *supra* note 7, at 442–43; *cf.* Myers, *supra* note 3, at 936–39. See also *McCullough v. United States*, No. 8:08-4137, 2009 WL 367371 (D.S.C. Feb. 13, 2009); *Sykes v. Frank*, 72 Fed. R. Serv. (Callaghan) 1279 (D.S.C. Mar. 6, 2009).

106. See Myers, *supra* note 3, at 900. This author has maintained elsewhere that the Vice President's civil immunity should be seen as absolute in both settings. See Brownell, *supra* note 7, at 440–43. Ultimately, the issue remains unresolved.

107. See Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 713 (1995) (arguing that while “not a ‘Senator or Representative,’ strictly speaking,” the Arrest Clause would still protect the Vice President from civil incarceration). *But cf.* ADAMS, *supra* note 45, at 216–17 (noting that a friend had passed “through the city of New York [and] he [had] heard that [Vice President Daniel Tompkins] was in prison for ten thousand dollars at the suit of Peter Jay Munro. It was for money that Munro had been compelled to pay as bondsman or endorser for Tompkins; but he understood it was probable the affair would be adjusted.”). If this rumor were true, then that could argue against the notion that the Vice President enjoys the protections from civil arrest that lawmakers enjoy.

108. *Cf.* Memorandum from Robert G. Dixon, Jr., Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, Regarding the Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office, at 40 (Sept. 24, 1973), available at <http://www.fas.org/irp/agency/doj/olc/092473.pdf> (arguing the Vice President does not enjoy criminal immunity); Memorandum from Randolph D. Moss, Assistant Att’y Gen., Office of Legal Counsel, A Sitting President’s Amenability to Indictment and Criminal Prosecution (Oct. 16, 2000), available at <http://www.justice.gov/sites/default/files/olc/>

Matters of statutory and regulatory interpretation are also aided by properly categorizing the Vice President within U.S. constitutional structure. Many statutes and executive orders make reference to the “executive branch” or “legislative branch.” Knowing where the Vice President fits in the system of separation of powers is essential to determining where the Vice President fits within these statutory regimes. Such questions about the Vice President have arisen and have perplexed government lawyers for years. This is reflected in Office of Legal Counsel (OLC) opinions about how he should be treated under the Freedom of Information Act,¹⁰⁹ conflict of interest provisions of 18 U.S.C. § 208,¹¹⁰ 3 C.F.R. part 100 regarding government ethics and financial disclosure,¹¹¹ the tax code,¹¹² the Hatch Act¹¹³ and civil service rules.¹¹⁴ One could readily imagine questions also arising under other statutory schemes.¹¹⁵ The net result of the confusing status of the office has been that

opinions/2000/10/31/op-olc-v024-p0222_0.pdf; *Clinton v. Jones*, 520 U.S. 681 (1997).

109. *See, e.g.*, Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Todd J. Campbell, Counsel and Director of Administration, Office of the Vice President, Whether the Office of the Vice President is an “Agency” for Purposes of the Freedom of Information Act (Feb. 14, 1994), available at <http://fas.org/irp/agency/doj/olc/021494.pdf> [hereinafter *Dellinger Memo*].

110. *See* Memorandum from Richard Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, to Laurence H. Silberman, Deputy Attorney General, Whether Governor Rockefeller, if appointed as Vice President, is Required to Execute a Blind Trust in Order to Avoid Possible Violation of 18 U.S.C. § 208 (Aug. 20, 1974), available at <http://www.fas.org/irp/agency/doj/old/082074.pdf>.

111. Memorandum from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, to Kenneth A. Lazarus, Associate Counsel to the President, Applicability of 3 C.F.R. § 100 to the President and Vice President (Dec. 16, 1974), available at <http://www.fas.org/irp/agency/doj/olc/121674.pdf> [hereinafter *Scalia Memorandum*].

112. *See* Letter from Harold F. Reis, Acting Assistant Attorney General, Office of Legal Counsel, to Walker Jenkins, Administrative Assistant, Office of the Vice President, On the Status of Vice Presidential Employees for Tax Purposes (July 24, 1962), available at <http://www.fas.org/irp/agency/doj/olc/072462.pdf> [hereinafter *Reis letter*].

113. *See* Memorandum from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, to the Attorney General, Applicability of the Hatch Act to the Vice President’s Staff (Apr. 6, 1977), available at <http://www.fas.org/irp/agency/doj/olc/040677.pdf>.

114. *See* Memorandum from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, to Robert W. Minor, Office of the Deputy Attorney General, Eligibility of the President to Civil Service Retirement Benefits (Jan. 19, 1955), available at <http://www.fas.org/irp/agency/doj/olc/011955.pdf>.

115. Another similarly perplexing entity is the Smithsonian Institution. Numerous comparable questions have arisen as to which branch it falls within under various statutory regimes. *See, e.g.*, Memorandum Opinion from Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, to the Assistant General Counsel, Smithsonian Institution, Immunity of Smithsonian Institution from State Insurance Laws, (Apr. 25, 1997), available at <http://www.justice.gov/sites/default/files/olc/opinions/1997/04/31/op-olc-v021-p0081.pdf> (discussing past judicial and OLC opinions considering the status of the Institution); Memorandum from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, to Office of Government Ethics, Office of Government Ethics Jurisdiction over the Smithsonian Institution, (Feb. 29, 2008), available at <http://www.justice.gov/sites/default/files/olc/opinions/2008/02/31/smithsonian-op-022908.pdf> (considering whether the Institution is subject to the Ethics in Government Act); Memorandum from Douglas W. Kmiec, Deputy

the Department of Justice and the Vice President's office have given numerous conflicting opinions as to where the Vice President is located and which statutes govern his actions. Barton Gellman has termed OLC's analyses over the years on the subject as "com[ing] down on three sides of the question."¹¹⁶

The same concerns come into play with interpretation of executive orders. Indeed, the highest profile debate over the Vice President's constitutional placement occurred as part of a dispute between Vice President Cheney and the National Archives and Records Administration over how the Vice President should be categorized under an executive order.¹¹⁷

Finally, knowing which branch or branches the Vice President falls within helps provide a measure of public accountability regarding his actions. Who does the Vice President answer to and when? If the Vice President is carrying out presidential delegations, he is formally answerable to the President, but not while presiding over the Senate. Neither the President nor the Senate on its own can remove the Vice President but each can sanction him by removing delegations of authority to him.

In sum, knowing where the Vice President resides within U.S. constitutional structure is important for a host of both conceptual and practical purposes.

III. THE VICE PRESIDENT AS PART OF BOTH THE LEGISLATIVE AND EXECUTIVE BRANCHES: TEXT, STRUCTURE, VIEWS OF THE FRAMERS AND THE COURTS

The best answer to the question of which elected branch the Vice President belongs to is that he belongs to both—though not to both simultaneously. His exact locus in U.S. constitutional structure varies depending on the context in which the Vice President is taking action.¹¹⁸ Such a conclusion is reinforced

Assistant Attorney General, Office of Legal Counsel, to General Counsel, General Services Administration, The Status of the Smithsonian Institution Under the Federal Property and Administrative Services Act, (June 30, 1988), *available at* <http://www.justice.gov/sites/default/files/olc/opinions/1988/06/31/op-olc-v012-p0122.pdf>; Memorandum from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, to Office of Government Ethics, Office of Government Ethics Jurisdiction Over the Smithsonian Institution (Feb. 29, 2008), *available at* <http://www.justice.gov/sites/default/files/olc/opinions/2008/02/31/smithsonian-op-022908.pdf>; David P. Currie, *The Smithsonian Centennial Tribute Essay*, 70 U. CHI. L. REV. 65 (2003); Nicole Picard, Comment, *A Treasured Institution, a Troubled Identity, and the Threat of Denotation: Whether the Smithsonian Institution is an Executive Agency Under 5 U.S.C. § 105 and Why it Matters*, 59 CATH. U. L. REV. 1139 (2010).

116. See Gellman, *supra* note 4.

117. See Letter from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to William Leonard, Director, Information Security Oversight Office, National Archives and Records Administration (July 20, 2007) (on file with author); Letter from Fred F. Fielding, Counsel to the President, to Senator Sam Brownback (July 12, 2007) (on file with author).

118. The companion to this article will demonstrate that the vice presidency's placement within American constitutional structure has not been static over time. It has evolved from being

by constitutional text and structure, the views of the Framers, judicial dicta and traditional legal reasoning. Each of these methodologies reveal strong vice presidential links to both political branches of government.

A. *Constitutional Text and Structure*

Vice presidential power flows less from constitutional grants than from delegations from the President¹¹⁹ and Congress.¹²⁰ Nonetheless, under the Constitution, as amended, the Vice President is granted the authority: 1) to preside over the Senate¹²¹ (except in the case of presidential impeachment),¹²² a power which today is often treated as little more than ceremonial;¹²³ 2) to

largely a legislative branch office to largely an executive branch office.

119. *See, e.g.*, TURNER, *supra* note 4, at 20 (“[T]he provision of a vice presidential role within the executive branch lies where it has always lain—within the discretion of the president.”); AT ISSUE: THE VICE PRESIDENCY, A CONVERSATION WITH HUBERT H. HUMPHREY 8 (1965) [hereinafter HUMPHREY] (“The Vice President today really has his responsibilities at the option or should I say, at the will of the President.”).

120. For example, Congress included the Vice President in the National Security Council (NSC) when it was modified in 1949. *See* National Security Act Amendments of 1949, 63 Stat. 579, § 3, 50 U.S.C. § 3002 (West 2013). This is one of an assortment of tasks assigned to him by Congress over the years. *See, e.g.*, Harold C. Relyea, *The Executive Office of the Vice President: Constitutional and Legal Considerations*, 40 PRESIDENTIAL STUD. Q. 327, 328–29 (2010). In the 1790s, he was, for instance, named to the board of the Sinking Fund, *see, e.g.*, Irving Gregory Williams, *The Vice-Presidency of the United States in the Twentieth Century: History, Practices, and Problems*, 14 (unpublished Ph.D. dissertation, New York University) (1953), and placed by statute in 1846 on the Board of Regents of the Smithsonian Institution, *see* 9 Stat. 102, 103 Sess. 1, ch. 178 § 3 (1846) (codified as 20 U.S.C. § 42); Relyea, *supra*, at 328–29, which is arguably part of the executive branch. *See supra* note 115.

In 1911, the Vice President was named chairman of the legislative branch’s Commission on Enlarging the Capitol Grounds. *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., RL30842, THE VICE PRESIDENCY: EVOLUTION OF THE MODERN OFFICE, 1933–2001, at 2 (2001). From 1914 to 1933, the Vice President served on the Arlington Memorial Bridge Commission. *See id.* Vice Presidents Charles Dawes, Charles Curtis and John Nance Garner served as ex officio participants on the Commission for the Celebration of the Two Hundredth Anniversary of the Birth of George Washington. *See id.* *See also* Relyea, *supra*, at 329 (listing commissions upon which the Vice President served).

121. *See* U.S. CONST. art. I, § 3, cl. 4. The power to preside carries somewhat more authority than is commonly supposed. The decision as to which senator should be recognized to hold the floor, in the words of Senator Robert Byrd, “cannot be appealed, and that means the Chair can, if he so wishe[s] be somewhat arbitrary in the recognition of Senators.” CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 500 (1989) (quoting Sen. Byrd). This provides the Vice President with a fair amount of “leeway, at least in theory.” *See id.* at 500–01. *See also* HUMPHREY, *supra* note 119, at 6 (“the Vice President does determine who will be recognized in the Senate, and this of course, is very important.”). An example of the Vice President’s power in this vein includes Vice President Harry Truman’s recognition of certain senators to help get Henry Wallace’s nomination as Secretary of Commerce approved by the upper chamber. *See* IRVING G. WILLIAMS, THE RISE OF THE VICE PRESIDENCY 219–20 (1956).

122. *See* U.S. CONST. art. I, § 3, cl. 6. Chief justices have had to exercise this role on only two occasions: during the impeachment trials of Presidents Andrew Johnson and Bill Clinton.

123. This was not always so. Early Senate rules and customs left the Vice President with

vote to break ties while presiding officer;¹²⁴ 3) to open certified listings of presidential electors and (presumably) be involved in the counting, a responsibility that no longer entails substantive authority;¹²⁵ 4) to succeed the President or President elect should he die, resign or leave the position vacant;¹²⁶ and 5) to substitute for the President should the chief executive suffer from inability, and to help make determinations as to the President's incapacity should there be uncertainty in this regard.¹²⁷ The only other constitutional clauses related to the Vice President concern election and selection procedure.

1. Text and Structure Reflecting the Vice President's Link to the Legislative Branch

a. Text

Constitutional text reveals that the Vice President is not clearly part of a single branch of the federal government. With respect to the legislative branch, he has several unambiguous linkages to the Senate, which is obviously part of the legislative branch.¹²⁸ First, the initial reference to the Vice President occurs in Article I,¹²⁹ primarily the legislative branch article of the Constitution.¹³⁰ Section 3 of Article I provides that:

significant authority as far as maintaining order in the upper chamber. See MARK O. HATFIELD & THE U.S. SENATE HISTORICAL OFFICE, *VICE PRESIDENTS OF THE UNITED STATES, 1789–1993*, at xvi (Wendy Wolff ed., 1997) [hereinafter HATFIELD]. See also JULES WITCOVER, *CRAP SHOOT: ROLLING THE DICE ON THE VICE PRESIDENCY* 19 (1992) (likening Vice President Adams to a majority leader during his tenure as presiding officer); Nelson, *supra* note 2, at 62 (“The first vice president, John Adams, operated in a manner not unlike a modern Senate majority leader, helping to shape the Senate’s agenda and organizing and intervening in debate.”); cf. 1 HAYNES, *supra* note 33, at 220 (“Early Presidents of the Senate [such as Adams and Burr] assumed some responsibility for the members’ procedure in debate.”).

124. See U.S. CONST. art. I, § 3. In reality, the power to break ties is in some ways less than it appears, because a tie vote automatically defeats the matter under consideration so a vice presidential vote to defeat a measure is essentially redundant. See, e.g., 1 HAYNES, *supra* note 33, at 232–33.

125. See U.S. CONST. amend. XII. That the counting of electoral votes is in the passive voice raises some question as to where the Framers entrusted this authority. See Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551, 552 (2004); Williams, *supra* note 120, at 14. In the early years under the Constitution, tabulating electoral votes was thought to place some discretion in the hands of the Vice President. See *id.* at 14–18. Both Adams and Jefferson made decisions regarding whether a handful of electoral votes should be included in the final tally and Congress acquiesced. See *id.* at 14–15. See also Ackerman & Fontana, *supra*, at 553–54 (“Without the decisive use of his power as President of the Senate, Jefferson might never have become President of the United States.”). Since the first decades of the nineteenth century, Congress has occupied the field. See 3 U.S.C. §§ 12–18 (defining in statute the Vice President’s duties in this regard). See also Ackerman & Fontana, *supra*, at 640–42; Williams, *supra* note 120, at 17–18.

126. See U.S. CONST. amend. XXV, § 1. See also *id.* amend. XX, §§ 3–4 (detailing procedures for the Vice President elect to become President upon the death of the President elect).

127. See *id.* amend. XXV, §§ 3, 4.

128. See *supra* note 26.

129. See HITE, *supra* note 2, at 16 (“[B]y including the vice president with the Congress in

[t]he Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided. The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.¹³¹

Thus, the Vice President's most tangible constitutional assignment involves the legislative branch where he has the authority to preside over the upper house and break tie votes. As Acting Assistant Attorney General for OLC Harold Reis wrote in 1962:

[The Vice President] is . . . made an officer of the Senate and given a right to vote in certain circumstances. It would reasonably follow that he is "in the legislative branch." . . . [In fact], it seems difficult to conceive that an officer whose only constitutional function, when the President is capable of exercising the Executive power, is to preside over the Senate and to vote . . . is not "in the legislative branch."¹³²

It is particularly notable that he is "President *of* the Senate." The word "of" clearly connotes that he is part of the upper chamber.¹³³ Use of the term "of" in other related and neighboring parts of the Constitution reaffirms that the Vice President should be considered part of the Senate and therefore part of the legislative branch.¹³⁴ He is "Vice President of the United States [and] shall be President of the Senate." There is little doubt that the first "of" in the clause denotes that the Vice President must be part of, and not separate from, the United States. This is underscored by the constitutional requirement that the President¹³⁵ and therefore the Vice President¹³⁶ must have been born in the

Article I, a place for the office was reserved prior to any mention of the president in the document.").

130. See *supra* note 70. See also Greenberg, *supra* note 3, at 26.

131. See U.S. CONST. art. I, § 3, cl. 4-5.

132. *Reis Letter*, *supra* note 112, at 3.

133. In this context, the term "of" is typically interpreted to mean part of a larger entity. That is as true now, see, e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 860 (11th ed. 2003) (defining "of" as "a function word to indicate the component material, *parts*, or elements or the contents . . . used as a function word to indicate belonging or a possessive relationship") (emphasis added); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1343 (2d ed. 1987) ("used to indicate material, component *parts*, substance, or contents . . . used to indicate possession, connection, or association") (emphasis added), as it was at the time of the framing, see, e.g., SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 502-03 (1768) (defining "of" as "among . . . noting extraction: as, a man *of* an ancient family; noting adherence, or belonging: as a Hebrew *of* my tribe") (emphasis added); THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (1780) (repr. ed. 1967) ("noting extraction . . . noting adherence or belonging").

134. Cf. Akhil Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (using constitutional text as a dictionary).

135. See U.S. CONST. art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.").

136. See *id.* amend. XII ("[N]o person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.").

United States and therefore be “of” the United States. Other constitutional titles for constitutional officers using the term “of” are consistent with this exegesis. The “President *of* the United States” is obviously part of the United States. Similarly, “members of Congress” are part of the legislature.¹³⁷

Thus, the Vice President is part of the Senate. And Article I is perfectly clear that the Senate is part of Congress, hence part of the legislative branch.¹³⁸ It provides that the “Congress of the United States . . . shall consist of a Senate and House of Representatives.”¹³⁹ Therefore, Article I, Sections 1 and 3, when read in tandem, reflect that the Vice President is part of the Senate, which is part of Congress and which in turn is part of the legislative branch. As a result, the Vice President is part of the legislative branch.

Moreover, following Article I’s provision that “[t]he Vice President of the United States shall be President of the Senate,” the Constitution provides that “[t]he Senate shall chuse their *other* Officers.”¹⁴⁰ Use of the term “other” here is instructive. It makes clear that the Vice President—as the President of the Senate—is himself a Senate officer.¹⁴¹ It is difficult to argue that the Vice President is a Senate officer but is not part of the Senate. After all, this constitutional language mimics that governing the House: “[t]he House of Representatives shall chuse their Speaker and other Officers.”¹⁴² Few would argue that the Speaker is not part of the House of Representatives.¹⁴³

137. *See id.* amend. XIV, § 3.

138. *See supra* note 26.

139. U.S. CONST. art. I, § 1.

140. *See id.* art. I, § 3, cl. 4–5.

141. *See, e.g.*, *Fed. Deposit Ins. Corp. v. Hurwitz*, 384 F. Supp. 2d 1039, 1098 (S.D. Tex. 2005) (“The Vice President of the United States is an officer of the legislative branch. His official function is to preside in the Senate.”); *White, supra* note 4 (“he is an ‘Officer’ of the Senate”); *cf. Brown v. Owen*, 206 P.3d 310, 320 (2009) (“While serving as the presiding officer of the senate, the lieutenant governor is an officer of the legislative branch.”); *Kirksey v. Dye*, 564 So. 2d 1333, 1336 (Miss. 1990) (“The Lieutenant Governor is constitutionally an officer of both executive and legislative departments His office . . . serves to place him *in* the Senate”) (emphasis added).

142. U.S. CONST. art. I, § 2, cl. 5. *See* George Beckwith, *Conversations with Different Persons*, in 17 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 1723, 1726* (John P. Kaminski et al. eds., 1995) (“[T]he Vice President . . . is the speaker of the Senate . . .”). Arguably the word “their” before “Speaker” could be read to connote a closer relationship by the House’s presiding officer to the parent chamber than the title “President of the Senate,” which does not include the possessive, “their.” *Cf. Steven G. Calabresi, The Political Question of Presidential Succession*, 48 *STAN. L. REV.* 155, 162 n.39 (1995). Such a position is less persuasive, however, than it may at first seem. If anything, the “their” reference would distinguish the Speaker from the “President of the Senate” in the mode of the former’s selection. The Speaker is chosen by the House’s membership whereas the President of the Senate is not chosen by senators but instead by the public through the Electoral College.

143. The Speaker is not constitutionally required to be a representative, but even were he a non-representative, there can be little doubt he would still be part of the legislative branch. After all, what other branch could lay claim to him since the three branches reflect a comprehensive system? *See United States v. Nixon*, 418 U.S. 683, 707 (1974).

Similarly, few would argue the President Pro Tempore is not part of the Senate.¹⁴⁴ And the President Pro Tempore essentially holds the same authority as presiding officer as the Vice President.¹⁴⁵

The separate title of “President of the Senate” would itself seem to reflect the divided status of the vice presidential position.¹⁴⁶ Indeed, it has been asserted that when acting as President of the Senate, he is part of the legislative branch; otherwise, he is Vice President and part of the executive department.¹⁴⁷ Arguably, that could have been what the Framers (or some of them) intended. The President of the Senate, as will be detailed, had his own freestanding position for much of the Constitutional Convention.¹⁴⁸ The vice presidency itself did not emerge in recognizable form until September 4, 1787, when the two posts were tied together.¹⁴⁹

Further, Article II—prior to being altered by the Twelfth Amendment—made explicit reference in one respect to the “President of the Senate,” as opposed to the Vice President. Article II, Section 1, Clause 3 provided that:

[e]lectors shall . . . make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.¹⁵⁰

144. The President Pro Tempore does not have to be a senator but again there is little doubt he is part of the legislative branch. See Arthur M. Schlesinger, Jr., *On the Presidential Succession*, 89 POL. SCI. Q. 475, 494 (1974).

145. See RICHARD C. SACHS, *THE PRESIDENT PRO TEMPORE OF THE SENATE: HISTORY AND AUTHORITY OF THE OFFICE* 11–12 (2003) (“As a presiding officer, the powers and prerogatives of the President pro tempore historically have differed little from those of the Vice President In the modern Senate, with the exception of his authority to appoint other Senators to preside, the President pro tempore’s powers as presiding officer differ little from those of the Vice-President.”). The same is true of the Chief Justice when presiding over a presidential impeachment trial. See Brownell, *supra* note 60, at 32–33, 38.

146. See, e.g., *ONSLAW IN REPLY TO PATRICK HENRY*, No. 1, at 10 (1826) (“It is obvious that the simple intention of the framers . . . was to annex to the office of Vice President that of President of the Senate.”); LOUIS CLINTON HATCH & EARL L. SHOUP, *A HISTORY OF THE VICE-PRESIDENCY OF THE UNITED STATES* 11 (repr. ed. 1970) (“[T]here is attached to the Vice-Presidency another office by nature wholly independent, that of President of the Senate.”).

147. See *CONG. GLOBE*, 29th Cong., 2d Sess. 161 (1847) (Sen. Badger) (“The Vice President, when absent from this Hall, was not the President of this body—he was *only* the Vice President of the United States; and when here, by virtue of his office, was the presiding officer of this body.”) (emphasis added).

148. See, e.g., 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 292 (Max Farrand ed., 1966) [hereinafter 1 FARRAND]; 2 FARRAND, *supra* note 35, at 155, 158, 165, 172, 179, 186, 239 n.14, 367, 427.

149. See 2 FARRAND, *supra* note 35, at 493–95, 497–500. See also Goldstein, *supra* note 4, at 511.

150. U.S. CONST. art. II, § 1, cl. 3 (amended by amend. XII).

The use of the separate title, “President of the Senate,” could be read to reflect an altogether separate role for the Vice President acting in his legislative branch capacity. As will be discussed in the companion to this article, in the first months under the Constitution, Senator William Maclay argued that Vice President John Adams should sign legislative documents only by making reference to his status as President of the Senate.¹⁵¹ Adams at first agreed to this but then took to signing documents as “President of the Senate and Vice President” with the upper chamber ultimately acquiescing.¹⁵²

The Twelfth Amendment could similarly be read to favor the supposition that the President of the Senate is a separate legislative branch position. It states that:

[t]he Electors shall . . . make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the *President of the Senate*;—The *President of the Senate* shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted¹⁵³

The Twelfth Amendment thus uses both titles, “Vice President” and “President of the Senate.” If the Framers of the amendment were looking to distinguish between the current Vice President and the candidates for the position, the term “sitting Vice President” or “incumbent Vice President” could certainly have been used in this context instead of “President of the Senate.”¹⁵⁴ That choice

151. See WILLIAM MACLAY, THE JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FROM PENNSYLVANIA 1789–1791, at 38–39 (Charles A. Beard ed., 1927).

152. See *id.* at 44. Vice President Cheney, for example, took action specifically in his capacity as President of the Senate and not as Vice President. See DICK CHENEY (WITH LIZ CHENEY), IN MY TIME: A PERSONAL AND POLITICAL MEMOIR 494–96 (2011).

153. U.S. CONST. amend. XII.

154. At least one federal court has viewed the provision as apparently referring only to the Vice President. See *Grinols v. Electoral College*, No. 12-cv-2997, 2013 WL 211135, at *4 (E.D. Cal. Jan 16, 2013) (“The Twelfth Amendment empowers the President of the Senate (who is the Vice President of the United States) to preside over a meeting between both the House of Representatives and the Senate”). See also *Grinols v. Electoral College*, No. 12-cv-2997, 2013 WL 2294885, at *6 n.6 (E.D. Cal. May 23, 2013).

It could be argued that reference to “President of the Senate” was meant to include within its ambit the President Pro Tempore. If that were truly what the Framers had intended, they certainly could have done a better job of clarifying this. Adding “or president pro tempore in the absence of the President of the Senate” would have more than sufficed. Nowhere else in the Constitution does it imply the President Pro Tempore is one and the same with President of the Senate (although as presiding officer they possess virtually the same authority). In the Twenty-Fifth Amendment, for example, the notice requirement of presidential inability is sent to the Speaker and the President Pro Tempore. In this context, the Senate officer is clearly distinct from that of the President of the Senate. See BIRCH BAYH, ONE HEARTBEAT AWAY: PRESIDENTIAL DISABILITY AND SUCCESSION 306 (1968) (writing with respect to the future Twenty-Fifth Amendment: “[i]n the Senate version . . . we . . . prescribed that all declarations of Presidential ability or inability be transmitted to the Speaker of the House and the President of the Senate. For the latter, the conference committee . . . substituted the President pro tempore of the Senate, since

of words could be read to connote the Vice President in his legislative branch capacity. While it is debatable whether the President of the Senate title theoretically reflects a separate position altogether, at the very least, it demonstrates the Vice President's clear participation *in* legislative branch activities.

Second, the Vice President should be considered part of the legislative branch not only because he presides over the upper chamber, but because he plays an important role in Article I, Section 5 legislative branch powers. That section provides:

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.¹⁵⁵

Regarding the first clause, there is precedent for the Vice President casting a deciding vote relating to whether an individual should be seated as a senator.¹⁵⁶ This is the case even though text refers explicitly to "Each House" having such authority. Therefore, the Senate has implicitly interpreted the Vice President in this setting as being part of the upper "House."

With respect to the second clause of Article I, Section 5, the Vice President participates in the Senate's internal rulemaking function by interpreting and applying the rules of the chamber.¹⁵⁷ Here again, he is playing a role in carrying out the constitutional power of the Senate.¹⁵⁸ The Vice

the Vice President, who serves as President of the Senate, would otherwise be transmitting his own declaration to himself."). As properly understood, the President Pro Tempore is merely a substitute for the President of the Senate. That is because the Constitution provides the "[t]he Vice President of the United States shall be President of the Senate." U.S. CONST. art. I, § 3, cl. 4. It does not say that the President Pro Tempore "shall be" Senate President; the President Pro Tempore is given his own distinct title. If the President Pro Tempore truly became the President of the Senate, he would be able to break tie votes because the Vice President is so authorized. This would improperly give the President Pro Tempore two votes.

155. U.S. CONST. art. I, § 5, cls. 1-3.

156. See 6 CONG. REC. 737-40 (1877).

157. See, e.g., Herbert J. Rissler, Charles Warren Fairbanks: Conservative Hoosier, 235 (unpublished Ph.D. dissertation, Indiana University) (1961).

158. See, e.g., SCHWARTZ, *supra* note 80, at 58.

President has assumed these roles despite (or perhaps because) text notes again that “Each House” may take such action. Similarly, the Senate, like the President, has also assigned duties to the Vice President. For example, he was given the task from time to time of designating committee assignments.¹⁵⁹ He also administers the oath of office to newly elected senators.¹⁶⁰

Finally, the Vice President has participated in the authority laid out in the third clause of Article I, Section 5, by reviewing and revising the Senate journal.¹⁶¹ Once again, these duties are assigned to “Each House.” No strictly executive branch personage could ever be delegated these types of intra-legislative branch authorities.

A third textual consideration reflecting the Vice President’s legislative branch role is that he presides over the counting and certification of electoral votes. As noted above, the Twelfth Amendment provides that “the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted”¹⁶² Once again, the Vice President is placed squarely within the legislative branch. The electoral votes are not counted and certified in the presence of the President of the United States or the Supreme Court. They are counted and certified in the presence of both houses of Congress¹⁶³ *within* the House Chamber. And all the while the President of the Senate is in the presiding officer’s chair. This constitutional assignment therefore bears the clear markings of a legislative branch responsibility.

A fourth and final textual consideration is that the Vice President is not subject to the Opinion Clause.¹⁶⁴ As with the removal power, presidential authority to request opinions of senior executive branch officials helps ensure the chief executive maintains some degree of control over them.¹⁶⁵ The Clause provides that “the President . . . may require the Opinion, in writing, of the

159. See, e.g., 1 HAYNES, *supra* note 33, at 211. Vice presidents apparently continued to enjoy authority to place senators on certain committees well into the twentieth century. See Williams, *supra* note 120, at 108–09, 342–45.

160. See WILLIAMS, *supra* note 93, at 29.

161. See 1 HAYNES, *supra* note 33, at 211.

162. U.S. CONST. amend. XII.

163. See *Bush v. Gore*, 531 U.S. 98, 153 (2000) (Breyer, J., dissenting) (“[T]he Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes.”); *Barnett v. Obama*, No. 09-0082, 2009 WL 3861788, at *14 (C.D. Cal. Oct. 29, 2009) (“The Twelfth Amendment provides a role for Congress to make the ultimate determination of who shall be president and vice president through the counting of the electoral votes.”), *aff’d sub nom.* *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011), *order clarified*, *Barnett v. Obama*, No. 09-0082, 2009 WL 8557250 (C.D. Cal. Dec. 16, 2009). The Vice President exercised this authority himself before Congress occupied the field. See *supra* note 125.

164. See, e.g., Vikram David Amar, “*Commander in Chief*”: *A New TV Drama Raises Constitutional Questions Worthy of Discussion*, FINDLAW, (Nov. 11, 2005) <http://writ.lp.findlaw.com/amar/20051111.html>; cf. Nelson, *supra* note 2, at 64.

165. See, e.g., Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 661 (1996); cf. CALABRESI & YOO, *supra* note 96, at 35.

principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices”¹⁶⁶ Notably, the provision governs only “principal Officer[s]” in “the executive Departments.” Neither of these elements applies to the Vice President.¹⁶⁷

“Principal Officers” are cabinet secretaries, not vice presidents.¹⁶⁸ As the Supreme Court has stated, “[p]rincipal officers are selected by the President with the advice and consent of the Senate.”¹⁶⁹ Vice presidents, of course, are not chosen in such a manner. As noted earlier, the Vice President is elected through the Electoral College, or in extraordinary circumstances, nominated by the President subject to congressional confirmation, a different process altogether from Senate advice and consent.¹⁷⁰ The Vice President, therefore, fails the “principal Officer” test.

Moreover, while the modern Vice President spends most of his time in the executive branch, he does not serve within an executive Department.¹⁷¹ The Supreme Court has concluded that “Department” means “a great division of the executive branch of the government, like the State, Treasury, and War”¹⁷² The Vice President does not administer a cabinet agency; he does not and

166. U.S. CONST. art. II, § 2, cl. 1; *cf.* Nelson, *supra* note 2, at 64.

167. *Cf.* Nelson, *supra* note 2, at 64.

168. *See* United States v. Germaine, 99 U.S. 508, 511 (1878) (a “principal officer . . . is the equivalent of the head of department”); Amar, *supra* note 165, at 673 (“[H]e [the President] may demand the opinion of the relevant Cabinet head(s).”).

169. Buckley v. Valeo, 424 U.S. 1, 132 (1976). *See also* Edmond v. United States, 520 U.S. 651, 659 (1997) (explaining that the Appointments Clause “vest[s] the President with the exclusive power to select the principal (noninferior) officers of the United States”); Morrison v. Olson, 487 U.S. 654, 716 (1988) (Scalia, J., dissenting) (“[M]ost (if not all) *principal* officers in the Executive Branch may be removed by the President *at will*.”).

170. *See* Brownell, *Recess Appointed*, *supra* note 69, at 624. The Vice President can also be chosen in the Senate should the Electoral College not produce a victor. *See* U.S. CONST. amend. XII. *See also id.* amend. XX, §§ 3–4.

171. *Cf.* Schwartz v. U.S. Dep’t of Treasury, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) (“Offices within the White House whose functions are limited to advising and assisting the President do not come within the definition of an ‘agency’ within the meaning of FOIA or the Privacy Act. This includes the Office of the President (and by analogy the Office of the Vice President) and undoubtedly the President and Vice President themselves.”). *See also* Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to the Counsel and Director of Administration, Office of the Vice President, Whether the Office of the Vice President is an “Agency” for Purposes of the Freedom of Information Act (Feb. 14, 1994), available at <http://www.fas.org/irp/agency/doj/olc/021494.pdf> (determining that the Vice President is not an “agency” for FOIA purposes).

172. Burnap v. United States, 252 U.S. 512, 515 (1920). *See also* Freytag v. Comm’r, 501 U.S. 868, 887 (1991) (quoting with approval H.R. REP. NO. 203, 89th Cong., at 3 (1st Sess. 1965) (“[I]t is instructive that the [legislative history] . . . on the Twenty-fifth Amendment confirm[s] that the term ‘department’ refers to Cabinet-level entities: . . . [the relevant congressional hearing report provides that] ‘[t]he intent . . . is that the Presidential appointees who direct the 10 executive departments named in [statute] . . . would participate . . . in determining inability.”)); *id.* at 886 (quoting United States v. Germaine, 99 U.S. 508, 510–11 (1878): “This Court for more than a century has held that the term ‘Department[t]’ refers only to ‘a part or division of the executive government, as the Department of State, or of the Treasury,’ expressly ‘creat[ed] and

never has run or otherwise been a part of the Department of State, Treasury or Defense.¹⁷³ In his executive branch capacity, he is considered part of the Executive Office of the President.¹⁷⁴

The Twenty-Fifth Amendment also reinforces that the Vice President is neither a principal Officer nor a part of an executive department. It lists the principal officers and executive departments separately from the Vice President. It provides that “the Vice President *and* a majority of . . . the principal officers of the executive departments” and “the Vice President *and* a majority of . . . the principal officers of the executive department [sic] . . .”¹⁷⁵ participate in the inability determination process. If the Vice President were a principal officer, the beginning of these provisions would be redundant. The word “other” would need to precede the phrase “the principal officers” for the Vice President to be considered in their number. For these reasons, the Opinion Clause—which provides for subordination of principal officers to the chief executive—does not apply to the Vice President. This further demonstrates that the Vice President is not wholly part of the executive branch.

Thus, while the Vice President has, as a practical matter, evolved over time to spend most of his professional time in the executive branch, he cannot completely escape his textual moorings to the legislative branch under Article I and the Twelfth Amendment. Practice simply cannot replace text.¹⁷⁶

b. Structure

In addition to these four textual factors, there are at least ten broader structural considerations that reflect the Vice President’s legislative branch connection and that further illustrate he is not solely an executive branch official despite the modern emphasis placed on those duties. These structural concerns are highlighted by the numerous ways in which under the Constitution the Vice President is dissimilar to the President, who is the quintessential executive branch official.¹⁷⁷ One would expect that, if the Vice

‘give[n] . . . the name of a department’ by Congress.”).

173. The Department of War was merged with the Department of the Navy and named the Department of Defense in 1949.

174. See EXECUTIVE OFFICE OF THE PRESIDENT, <http://www.whitehouse.gov/administration/eop> (last visited Oct. 1, 2012) (“The following entities exist within the Executive Office of the President . . . Office of the Vice President.”).

175. U.S. CONST. amend. XXV, § 4 (emphases added).

176. See, e.g., HITE, *supra* note 2, at 160 (“The inference is not of the vice president’s role in the legislative branch being incrementally erased by a commensurate increase in responsibilities in the executive government—nor could it, as presiding in the Senate was precisely where the Constitution sanctioned the vice president to be.”); cf. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution.”).

177. See *Mississippi v. Johnson*, 71 U.S. 475, 500 (1866); *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att’y Gen. 74, 79 (1861) (“The President is a department of the government; and . . . the only department which consists of a single man”); Letter from John Adams to Oliver Whipple (May 18, 1790) (on file with author) (the “executive department by the constitution is *wholly* in the President.”) (emphasis added); DAVID A. MCKNIGHT, THE

President were solely part of the executive branch, he would receive treatment by the Constitution that accords with that of the President, the only other constitutional officer in that department of government. After all, the Vice President is the President in waiting.

As an initial matter, officials in the other branches are generally treated by the Constitution in the same manner as their intra-branch peers while the Vice President is not. Constitutionally speaking, other than the Speaker and the President Pro Tempore, there is no distinction among federal lawmakers in their respective chambers.¹⁷⁸ That is to say that all federal lawmakers vote for bills, resolutions and constitutional amendments. All senators may vote on nominations, on treaties and in impeachment trials. Each lawmaker can exercise and participate in all of the chamber's constitutional responsibilities. They also enjoy all the same privileges. All federal lawmakers, for instance, enjoy absolute immunity from civil suit for official actions and an internal confidentiality privilege under the Speech or Debate Clause.¹⁷⁹ Their equal constitutional treatment is reflected by their equal voting power. The President Pro Tempore does not cast two votes, only one. The same is true of the Speaker.

Federal judges, when compared to their peers, are also treated the same. With the exception of the Chief Justice, who must preside over impeachment trials of the President,¹⁸⁰ nothing distinguishes him, as a constitutional matter, from his fellow justices. All Supreme Court justices review and deliberate on cases and controversies subject to the same jurisdictional constraints.¹⁸¹ They each are protected from having their salaries diminished.¹⁸² They each enjoy a privilege regarding the confidentiality of their internal deliberations.¹⁸³

ELECTORAL SYSTEM OF THE UNITED STATES: A CRITICAL AND HISTORICAL EXPOSITION OF ITS FUNDAMENTAL PRINCIPLES IN THE CONSTITUTION, AND OF THE ACTS AND PROCEEDINGS OF CONGRESS ENFORCING IT 346 (1878) (repr. ed. 1993) ("the President is . . . one branch of 'the Government'"); Woodrow Wilson, Address to a Joint Session of Congress on Tariff Reform (Apr. 8, 1913), available at <http://www.presidency.ucsb.edu/ws/?pid=65368> ("the President of the United States is . . . not a mere department of the Government"). See also Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. L. REV. COLLOQUY 13 (2012), available at <http://www.law.northwestern.edu/lawreview/colloquy/2012/7/LRColl2012n7Tillman.pdf>.

178. See, e.g., MAYHEW, *supra* note 45, at 8–9 (quoting Gerhard Loewenberg, *The Role of Parliaments in Modern Political Systems*, in MODERN PARLIAMENTS: CHANGE OR DECLINE 3 (Gerhard Loewenberg ed., 1971): a "representative assembly [is] . . . [an] entit[y] [whose] . . . 'members are formally equal to each other in status, distinguishing parliaments from hierarchically ordered organizations.'").

179. See U.S. CONST. art. I, § 6, cl. 1; *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007); *but cf.* *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011).

180. See U.S. CONST. art. I, § 3, cl. 6.

181. See *id.* art. III, § 2.

182. See *id.* § 1.

183. See, e.g., *In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Cir.*, 783 F.2d 1488 (11th Cir. 1986).

Not so with the Vice President and the President. There are numerous constitutional distinctions between the two. First, the Constitution provides an oath for the President. Article II provides that:

[b]efore he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."¹⁸⁴

Yet, a vice presidential oath is nowhere to be found in the charter.¹⁸⁵ It is provided by statute instead and is worded differently from the President's oath.¹⁸⁶ The Vice President, in this respect, is treated like part of the legislative branch whose membership swears an oath prescribed by statute, not constitutional text.¹⁸⁷ All lawmakers and all judges are treated just like their intra-branch peers as far as oath taking, but the President and Vice President are not.

Second, the Chief Justice—as opposed to the Vice President—chairs the President's impeachment trial in the Senate: deliberations which determine whether the President should be removed from office. Article I mandates that "[t]he Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside."¹⁸⁸ Yet, no special provision exists regarding which officer would preside over a vice presidential impeachment trial.¹⁸⁹ This is the case even though the next in line to the

184. U.S. CONST. art. II, § 1, cl. 8.

185. See, e.g., J. Michael Medina, *The American Vice-Presidency: Toward a More Utilized Institution*, 13 GEO. MASON L. REV. 77, 80 (1990); Stephen W. Stathis & Ronald C. Moe, *America's Other Inauguration*, 10 PRESIDENTIAL STUD. Q. 550, 550 (1980). Unlike the treatment given the President under the original Constitution, no provision was made for vice presidential qualifications or for the replacement of the Vice President within his four-year term. See Medina, *supra*. Both issues were fixed by subsequent constitutional amendments. See U.S. CONST. amend. XII; *id.* XXV, § 2.

186. See Act of June 1, 1789, ch. 1, § 2, 1 Stat. 23. The original statutory wording has since been amended and remains different from the President's. See 5 U.S.C. § 3331.

187. Interestingly, while the President has almost uniformly been sworn in by the Chief Justice, the Vice President has been sworn in by a congeries of officials. See Stathis & Moe, *supra* note 185, at 561–64.

188. U.S. CONST. art. I, § 3, cl. 6. For more on the Chief Justice's role, see Brownell, *supra* note 60.

189. One prominent authority has argued against the Vice President being able to preside over his own impeachment trial. See Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial? A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849, 853 (2000). For a different take on this textual lacunae, see *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services*, 448 F.3d 1092, 1100 n.5 (9th Cir. 2006) (Bybee, J., dissenting) (commenting, with regard to denial of en banc rehearing, that judges should not try to amend "provisions of the Constitution that don't make as much sense as we would like," noting "that Vice President Agnew, as president of the Senate, would have presided at his own impeachment trial"). See also Michael Stokes Paulsen, *Someone Should Have Told Spiro Agnew*, 14 CONST. COMMENT. 245 (1997). Under Senate rules, the Chief Justice chairs the impeachment trial of an

presidency may fully participate and vote during presidential impeachment trials, demonstrating that the Constitution permits conflicts of interest in the presiding officer's chair.¹⁹⁰ According to constitutional text, the proceedings governing an impeached Vice President are like those involving a federal judge, not the President.¹⁹¹ Lawmakers, of course, are treated the same in their respective chambers as to expulsion.¹⁹²

Third, there is no constitutional provision laying out a process governing what happens during a time of vice presidential inability.¹⁹³ The Twenty-Fifth Amendment provides an explicit means of determining presidential incapacity when it is a matter of dispute. It states:

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his

acting President as well. See Edward T. Swaine, *Hail, No: Changing the Chief Justice*, 154 U. PA. L. REV. 1709, 1713 n.22 (2006).

190. See, e.g., Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 1, 28 (2010). Senator Ben Wade was the President Pro Tempore of the Senate during the impeachment trial of President Andrew Johnson. Since Johnson succeeded Abraham Lincoln following the latter's assassination and since there was no mechanism to replace a Vice President in the middle of a presidential term, the successor to Johnson was Wade under existing law. See *id.*

191. This could have merely been an oversight by the Framers who did not finalize the vice presidency until toward the end of the Convention. See, e.g., Goldstein, *supra* note 4, at 510–12. For example, the original Framers seemed to have forgotten to ensure that the Vice President should meet the same eligibility requirements as the President. This lack of express qualifications for the Vice President drew mention at the time of New York's Ratification Convention. See *Letter IV*, in 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: NEW YORK 231 (Oct. 12, 1787) (John P. Kaminski et al. eds., 2003) (“It is doubtful whether the vice president is to have any qualifications; none are mentioned; but he may serve as president, and it may be inferred, he ought to be qualified therefore as the president; but the qualifications of the president are required only of the person to be elected president.”). As noted earlier, the Twelfth Amendment addressed this apparent oversight. See U.S. CONST. amend. XII.

192. See U.S. CONST. art. I, § 5, cl. 2.

193. See, e.g., Amar, *supra* note 190, at 20. See also Roy E. Brownell II, *Coping with Vice Presidential Incapacity* (forthcoming article).

office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.¹⁹⁴

Despite the elaborate provisions for deciding presidential inability, the text treats the Vice President differently, authorizing Congress to govern vice presidential incapacity by statute.¹⁹⁵ As Congress has not yet done so, it is unclear how an incapacitated Vice President would be dealt with, if at all, as a constitutional matter. Unlike the disparate textual treatment of the President and Vice President regarding both impeachment trials and inability determinations, all federal lawmakers are treated identically in these respects. Article III judges, as a constitutional matter, are also treated the same as to their removal due to inability.¹⁹⁶ The presidential-vice-presidential disparity in this vein leads one to conclude again that the Vice President is not wholly part of the executive branch.

Fourth, vice presidents—unlike presidents—are not term limited.¹⁹⁷ Under the Twenty-Second Amendment, the President may only serve two terms. It provides that:

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term of which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.¹⁹⁸

The Vice President, on the other hand, may be reelected indefinitely. So long as he does not act as or become President, there is no limitation on his tenure. This difference between the President and Vice President is unlike tenure

194. U.S. CONST. amend. XXV, § 4.

195. See Amar, *supra* note 190, at 22–23. Congress has taken no action on the matter. The original text treated the President and Vice President similarly in this regard, see U.S. CONST., art. II, § 1 cl. 6, but the Twenty-Fifth Amendment now provides a mechanism only for determining inability in the President. See *id.* at amend. XXV §§ 3–4.

196. See U.S. CONST. art. II, § 4; *id.* art. III, § 1. This is also governed by statute. See Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351–64.

197. See, e.g., Williams, *supra* note 120, at 355; HITE, *supra* note 2, at 209.

198. U.S. CONST. amend. XXII, § 1.

among members of Congress¹⁹⁹ or the federal judiciary,²⁰⁰ who are uniformly treated the same as their colleagues in their respective branches. Lawmakers are not term limited. Senators across the board can be reelected indefinitely to six-year terms and representatives indefinitely to two-year terms. Federal judges all have life tenure. Again, the difference between the President and Vice President is notable and strongly implies the Vice President is not a part of the executive branch all of the time. As to tenure, the Vice President appears to be much more like a lawmaker.

Fifth, the lack of presidential authority to remove the Vice President reflects the latter's lack of an unambiguous tie to the executive branch. Senior executive branch officials are removable by the President. Cabinet secretaries, for example, fall under this rubric and can be relieved of their duties at any time.²⁰¹ The Vice President is the only member of the cabinet who is irremovable by the President.²⁰²

In *Morrison v. Olson*, the Supreme Court pronounced that “*Myers [v. United States]* was undoubtedly correct in its broader suggestion that there are some ‘purely executive’ officials who must be removable by the President at will if he is to be able to accomplish his constitutional role.”²⁰³ The Vice President, as noted, is not removable by the President. Therefore, in applying the Court's reasoning in *Morrison*, one can only conclude that the Vice President is not a “‘purely executive’ official” since the President cannot remove him.

Not only does the President lack authority to remove the Vice President, but it will be recalled that the chief executive is not granted the power to require written opinions from him.²⁰⁴ The removal power and the power to

199. *See id.* art I, §§ 2–3.

200. *See id.* art. III, § 1.

201. *See, e.g.*, *Myers v. United States*, 272 U.S. 52 (1926). Cabinet secretaries are also subject to removal through the impeachment process. Secretary of War William Belknap was faced with the specter of impeachment and removal and resigned; the Senate ultimately acquitted him. *See, e.g.*, MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 23–24 (2d ed. 2000).

202. *See, e.g.*, *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir 1993) (“The Vice President is the only senior official in the executive branch totally protected from the President's removal power.”); *Scalia Memorandum, supra* note 111, at 3 (“With regard to the Vice President there is even a constitutional question whether the President can direct him to abide by prescribed standards of conduct. The Vice Presidential Office is an independent constitutional office, and the Vice President is independently elected. Just as the President cannot remove the Vice President, it would seem he may not dictate his standards of conduct.”); TURNER, *supra* note 4, at 21 (“[T]he vice president (because of his elected status) is beyond his [the President's] power of dismissal.”); Nelson, *supra* note 2, at 62, 64 (“The vice president . . . holds a constitutionally independent office . . . [T]he president cannot command the vice president to do or not do anything, nor can the president fire the vice president.”). In this vein, it is perhaps more useful to think of the President as lacking the authority to relieve the *President of the Senate* of his duties.

203. *Morrison v. Olson*, 487 U.S. 654, 690 (1988).

204. *See Amar, supra* note 164. *See also supra* notes 164–75 and accompanying text.

request opinions of senior executive branch officials are obviously essential to the President's control over the executive branch.²⁰⁵

Of course, after his first term, the President may select another running mate. But that does not constitute removal, since the sitting Vice President would still serve out the remainder of his four-year term. The President could also virtually banish the Vice President from the executive branch,²⁰⁶ but that would not force the Vice President from his position. He would simply return to presiding over the Senate full time. For the Vice President to be removed, he must be impeached by the House and removed by the Senate.²⁰⁷ Thus, the fact that the President cannot remove the Vice President provides a further indication that the latter is not a garden-variety senior member of the executive branch.²⁰⁸

Sixth, while Congress may not reduce the President's salary,²⁰⁹ there is no prohibition against it doing so against the Vice President.²¹⁰ In order to protect constitutional officers in the magisterial branches from being cowed by Congress' Power of the Purse, the Framers restricted the legislative branch's authority to reduce the salaries of these officials.²¹¹ With respect to the President, Article II, Section 1, Clause 5 provides that "[t]he President shall, at stated Times, receive for his Services, a Compensation, which shall neither be

205. See, e.g., CALABRESI & YOO, *supra* note 96, at 14, 20, 35.

206. Vice presidential exile from the executive branch would not be complete, owing to his role under the Twenty-Fifth Amendment to help determine presidential inability and the statutory mandate that the Vice President serve on the NSC. Of course, the President could simply choose not to assemble the NSC. President Johnson did this to isolate Vice President Hubert Humphrey. See Joel K. Goldstein, *More Agony than Ecstasy: Hubert H. Humphrey as Vice President*, in *AT THE PRESIDENT'S SIDE, THE VICE PRESIDENCY IN THE TWENTIETH CENTURY* 109 (Timothy Walch ed., 1997) [hereinafter *PRESIDENT'S SIDE*].

207. See U.S. CONST. art. II, § 4.

208. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627 (1935) ("[A]n [executive] officer is . . . one of the units in the executive department, and hence, *inherently* subject to the exclusive and illimitable power of removal by the Chief Executive.") (emphasis added); Reynolds, *supra* note 4, at 112 ("In various separation of powers cases . . . the Supreme Court has placed a lot of weight on this who-can-fire-you test.").

209. See U.S. CONST. art. II, § I, cl. 7.

210. See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 448 (2005).

211. See, e.g., *THE FEDERALIST* NO. 73, at 371 (Alexander Hamilton) (Garry Wills ed., 1982) ("The third ingredient towards constituting the vigor of the executive authority is an adequate provision for its support. It is evident that without proper attention to this article, the separation of the executive from the legislative department would be merely nominal and nugatory. The Legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will, as they might think proper to make him. They might in most cases either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations. . . . And in the main it will be found, that a power over a man's support is a power over his will."); *THE FEDERALIST* NO. 79, at 400 (Alexander Hamilton) (Garry Wills ed., 1982) ("Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the president, is equally applicable here. In the general course of human nature, a power over a man's subsistence amounts to a power over his will.").

increased nor diminished during the Period for which he shall have been elected.”²¹² Similarly, with respect to federal judges, Article III, Section 1 provides that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”²¹³

The question with respect to the Vice President is: why was he not included along with the President if he too is solely part of the executive branch? The only constitutional officers excluded from this clause were those in the legislative branch, and that is presumably because they themselves control the fisc and are not subject to the risk of congressional intimidation. Presumably, the Vice President’s absence from these protections reflects his status as being part of the legislative branch (at least part of the time). Appropriations bills today reflect this view in that the Vice President’s salary is provided as part of legislative branch funding.²¹⁴ The President’s salary, on the other hand, is funded through an entirely different appropriations bill.²¹⁵

The question of reducing the Vice President’s salary is not merely an abstraction. This has occurred on two occasions. In 1932, as part of the Economy Act, Congress lowered the Vice President’s compensation along with that of all federal lawmakers.²¹⁶ To comply with the Constitution, this

212. U.S. CONST. art. II, § 1, cl. 5.

213. *Id.* art. III, § 1.

214. *See, e.g.*, Act of Oct. 1, 2009, Pub. L. 111-68, Tit. I (providing funds for the Vice President’s salary). On occasions earlier in U.S. history, the Vice President’s salary was categorized as part of the executive branch. *See, e.g.*, Act of March 3, 1873, ch. 226, 17 U.S. Stat. 485. Vice presidential office and staff expenses are currently paid for in both legislative branch and executive branch appropriation bills.

Statutory treatment of the Vice President over the years has reflected the ambiguity of the office. Some legislative regimes treat him like a member of Congress. *See* 5 U.S.C. § 2106 (2014); 5 U.S.C. § 3331 (2014) (the Vice President treated like lawmakers for his oath of office); *Reis Letter, supra* note 112, at 2 (“[T]he pattern of congressional treatment of the Vice President has been to treat him as being in the legislative branch . . .”). In others, he is treated like part of the executive branch. *See, e.g.*, 44 U.S.C. § 2207 (1978) (the Vice President treated like the President as far as preservation of records); 50 U.S.C. § 3021 (2014) (the Vice President serves as a member of the NSC); Brownell, *supra* note 5 (the Vice President has been delegated duties in the executive branch from the beginning); *cf.* 20 U.S.C. § 42 (1998) (member of Board of Regents of the Smithsonian). *See also* Greenberg, *supra* note 3, at 29–30 (discussing different U.S. Code statutory regimes regarding the Vice President). For a discussion of the statutory treatment of the Vice President in the early years under the Constitution, please see the companion to this piece, Brownell, *supra* note 5.

215. *See* Consolidated Appropriations Act, 2010, Pub. L. 111-117, 123 Stat. 3034 (providing funds for the President’s salary).

216. *See* Economy Act of 1932, § 105(a), ch. 314, 47 Stat. 382, 401 (“The salaries of the Vice President and the Speaker of House of Representatives are reduced by 15 per centum; and the salaries of Senators, Representatives in Congress . . . are reduced by 10 per centum.”). *See also Slashes to Save \$37,500*, N.Y. TIMES, July 16, 1932, 1; James R. Garner, Office of the Vice President of the United States (1934) (unpublished Ph.D. dissertation, University of Iowa) (on file with author).

legislation excluded the President and federal judges.²¹⁷ The same situation occurred in 1874.²¹⁸ In both instances, the Vice President's compensation was treated the same as the pay of members of Congress, and differently from that of the President.

Seventh, the Vice President through his authority to preside over the Senate and break ties, takes part in a wide range of functional legislative activities that the President cannot, underscoring the vice presidential attachment to the legislative branch. For instance, the Vice President can play a role in the consideration of constitutional amendments.²¹⁹ While adoption of amendments themselves requires a two-thirds majority of the Senate,²²⁰ votes prior to final disposition of the amendment are subject to a majority vote, offering the Vice President an opportunity to break ties. And, even if he never has to break a tie on a preliminary vote on a constitutional amendment, the Vice President can preside over all such deliberations.

Structurally, the Vice President's ability to formally affect the text of constitutional amendments reflects that he is not part of the executive branch when presiding over the Senate. Indeed, he could not play such a role as an executive branch official consistent with *Hollingsworth v. Virginia*.²²¹ That decision established the principle that presidents do not have constitutional amendments submitted to them for their review. Since the President plays no part in approving or vetoing constitutional amendments and since the President is the constitutional embodiment of the executive branch,²²² it would almost certainly seem to follow that no other member of the executive branch could play such a role.²²³ The fact that the Vice President may participate in

217. See Economy Act § 105(a).

218. See Act of Jan. 20, 1874, Rev. Statutes of the United States, 43d Cong. 1st Sess., 1873–74, Appendix, ch. 11, 1093 (“[T]he act of March third, eighteen hundred and seventy-three . . . as provides for the increase of the compensation of public officers and employees . . . except the President of the United States and Justices of the Supreme court be, and the same is hereby repealed, and the salaries, compensation, and allowances of all such persons, except as aforesaid, shall be fixed by the laws in force at the time of the passage of said act . . .”). See also EDWARD WATERMAN TOWNSEND, OUR CONSTITUTION: WHY AND HOW IT WAS MADE—WHO MADE IT, AND WHAT IT IS 187–88 (1906).

219. See Williams, *supra* note 120, at 40–41; Oliver P. Field, *The Vice Presidency of the United States*, 56 AM. L. REV. 365, 391 (1922); 47 CONG. REC. 1949–59 (1911); cf. Coleman v. Miller, 307 U.S. 433 (1939). Vice presidential participation in the amendment process would be counter to the views of at least one of Framers. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 400 (Max Farrand ed., 1966) (Nov. 23, 1803) (Butler) (ANNALS OF CONG., 8th Cong. 1st Sess. 82) (“It never was intended by the Constitution that the Vice President should have a vote in altering the Constitution.”); cf. Opinion of the Justices of the Supreme Court in Response to Questions Propounded by the Governor of Delaware, 225 A.2d 481 (Del. 1966) (concluding the President of the Delaware Senate could break ties on any matter).

220. See U.S. CONST., art. V.

221. See *Hollingsworth v. Virginia*, 3 U.S. 378 (1798).

222. See *supra* note 177.

223. The Vice President is under no constitutional obligation to vote the way the President wants him to. See Brownell, *Independence*, *supra* note 69, at 321–40 (providing examples of the Vice President voting contrary to the President's views).

consideration of constitutional amendments underscores his status as part of the legislative branch when presiding over the Senate.

The Vice President can also preside over and vote on matters involving internal Senate organization and operations that, like constitutional amendments, are not presented to the President for his consideration.²²⁴ For example, Vice President John C. Calhoun²²⁵ and Vice President Millard Fillmore²²⁶ voted to decide the fate of potential Senate officers. On another occasion, Vice President William Wheeler broke a tie relating to whether an individual should be seated as a senator.²²⁷ Vice President Chester Arthur's,²²⁸ Vice President Al Gore's and Vice President Cheney's power to cast tiebreaking votes²²⁹ essentially decided which party would control the Senate.²³⁰ That is to say the Vice President's vote in these settings determined which party set the legislative agenda, controlled the committees and appointed the Senate officers. One might well ask what clearer signal there could be of being part of the legislative branch than voting inside one of its chambers to determine which party governs that half of Congress.

Another example of the Vice President taking part in intra-Senate governance involves adjournment. Vice President James Sherman, for example, broke a tie determining whether the Senate should adjourn.²³¹ Under the Constitution, however, the question of adjournment is expressly *excluded* from formal executive branch influence. Article I provides that “[e]very Order, Resolution, or Vote to Which the Concurrence of the Senate [occurs] . . . (except on a question of Adjournment) shall be presented to the President.”²³² Therefore, as with constitutional amendments, the Vice President is permitted to participate in this sort of legislative activity that the President is not.

In a similar vein, it perhaps bears remembering that, following bicameral passage of legislation, the enrolled bill is signed by the President of the Senate and the Speaker of the House. Rule XIV of the Senate provides that “[a]ll bills, amendments, and joint resolutions . . . [are] signed by . . . the President of

224. See, e.g., Henry Barrett Learned, *Casting Votes of the Vice-Presidents, 1789–1915*, 20 AM. HIST. REV. 571, 575–76 (1915); Garner, *supra* note 216, at 137–42.

225. See Learned, *supra* note 224, at 572; Garner, *supra* note 216, at 137.

226. See Learned, *supra* note 224, at 572.

227. See *id.* at 572–73.

228. See *id.* at 573–74.

229. See 147 CONG. REC. S29–48 (daily ed. Jan. 5, 2001) (statements of Sens. Dorgan, Daschle, Lott, Byrd, Conrad and Levin). See also William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597, 620 n.64 (2009).

230. See, e.g., *Hoffman v. Jeffords*, 175 F. Supp. 2d 49, 51 (D.D.C. 2001) (writing of the Cheney scenario that “Republicans had gained working control of the Senate because of the Vice President’s power, as President of the Senate, to cast tie breaking votes.”).

231. See 46 CONG. REC. 1826, 61st Cong., 3d Sess. (1911). See also Williams, *supra* note 120, at 131.

232. See U.S. CONST. art. I, § 7, cl. 3; cf. Williams, *supra* note 120, at 134.

the Senate²³³ It would almost certainly violate the requirements of the Presentment Clause for an official in the executive branch to preside over debate on a bill, vote to break a tie on the measure and then sign it before it is officially presented to the President as required under Article I. This would give the executive branch an impermissible two bites at the lawmaking apple.²³⁴ Similarly, it would appear to run afoul of the strict procedures laid out in the Presentment Clause for the President to veto a measure and then the Vice President cast a vote on a procedural matter involving an effort to overturn that presidential veto.²³⁵ That would also provide the executive branch with two bites at the apple. This is because the courts, so as to ensure the executive branch does not exceed the carefully prescribed bounds of the lawmaking process, have narrowly construed the Presentment Clause.²³⁶

The Vice President can also preside over and vote on Senate and concurrent resolutions neither of which is presented to the President. Further, the Vice President can vote on bills that the President never sees, such as measures that do not pass both houses. There is even precedent for the Vice President giving the morning prayer in place of the Senate chaplain²³⁷ and pairing his vote with a Senator.²³⁸ Again, were the Vice President at all times an executive branch official, it would seem that he would play no part whatsoever in any of these strictly internal Senate functions.

Eighth, the Vice President would seem able to preside over the upper chamber and break ties in a contested vice presidential election decided in the Senate, even in a scenario where he would be one of the competing candidates.²³⁹ The Twelfth Amendment provides that, if no vice presidential candidate receives a majority of electoral votes, the Senate must choose the

233. *Rules of the Senate: Joint Resolutions, Resolutions, and Preambles Thereto*, COMMITTEE ON RULES & ADMINISTRATION, <http://rules.senate.gov/public/index.cfm?p=RuleXIV>.

234. *Cf.* MACLAY, *supra* note 151, at 39 (having the President of Senate sign documents directed from the Senate to the President as “Vice President” “was like a man signing an address to himself. That the business of Vice-President was when he acted exactly the same with that of the President, and could not mix itself with us as a Senate.”).

235. *See* Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1721 n.74 (1988).

236. *See* *Clinton v. City of New York*, 524 U.S. 417 (1998).

237. *See* 29 CONG. REC. 14333, 81st Cong., 1st Sess., Oct. 24, 1949. *See also* POLLY ANN DAVIS, ALBEN W. BARKLEY: SENATE MAJORITY LEADER AND VICE PRESIDENT 287–88 (1979).

238. *See* 53 CONG. REC. 8510, 64th Cong., 1st Sess. May 23, 1916. *See also* CHARLES M. THOMAS, THOMAS RILEY MARSHALL, HOOSIER STATESMAN 162–63 (1939); *Tie Vote in Senate Disposes of Rublee*, N.Y. TIMES, May 24, 1916, at A22.

239. *See* Josephson, *supra* note 229, at 618–20. *See* *Sanstead v. Freed*, 251 N.W.2d 898, 910–11 (N.D. 1977) (Vogel, J., dissenting in part, concurring in part) (emphasis added) (“The Constitution of the United States was adopted in 1789, and from then until now, the Vice President has broken tie-votes on *all* measures, substantive and procedural, before the United States Senate.”); Williams, *supra* note 120, at 135 (“[T]he casting vote extends to any such matter whenever the Senate ‘be equally divided.’”). *But see* LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 165 (1996).

new Vice President.²⁴⁰ If the incumbent Vice President were up for reelection, he could cast the tie-breaking vote in favor of his own candidacy. This is yet another legislative branch matter that the President plays no formal role in whatsoever. This again reaffirms why the Vice President is not solely part of the executive branch.

Ninth, the Vice President plays a role in both the beginning of a Senator's term and in the premature end of a Senator's tenure. With regard to the beginning of Senate terms, vice presidents have long formally sworn in newly elected senators. The President, or a strictly executive branch official, does not swear them in. At the other end of the spectrum, senators submit their resignation letters to the Vice President.²⁴¹ The very fact that senators submit their resignation letters to the Vice President is yet another indication of the Vice President's linkage to the legislative branch.

Finally, if the Vice President were in the executive branch at all times, why would the Framers have bothered to prohibit him from serving simultaneously as both President of the United States and President of the Senate? If the Vice President were solely an executive branch official, he would be acting as the executive branch's proxy anyway. The effect would be the same as the Vice President presiding over the upper chamber while serving as Acting President. Under either scenario, the Senate would be presided over by the Acting President himself or by the President's agent (a legally subordinate Vice President). That the Framers seemed largely untroubled by the Vice President heading the Senate²⁴²—yet explicitly prohibited him from serving as such when elevated to the presidency—would seem to indicate they viewed the vice presidency as largely a legislative branch position.

240. See U.S. CONST. amend. XII.

241. See, e.g., Letter from Barack Obama, U.S. Senator, to the Honorable Richard Cheney, Vice President of the United States and President of the U.S. Senate (Nov. 18, 2008), *found at* CONG REC. S10609, Nov. 19, 2008; Letter from Joseph P. Biden, Jr., U.S. Senator, to the Honorable Richard Cheney, President of the United States Senate (Jan. 9, 2009), *found at* CONG. REC. S255, Jan. 9, 2009; Letter from Trent Lott, U.S. Senator, to the Honorable Richard B. Cheney, President of the United States Senate (Dec. 18, 2007), *found at* CONG. REC. S15943, Dec. 18, 2007. Both Senators Biden and Lott omitted reference to the title "Vice President" in their letters. For more on senatorial resignation, see Letter from William Samuel Johnson, U.S. Senator, to John Adams, Vice President of the United States (Mar. 4, 1791), *in* 2 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: SENATE EXECUTIVE JOURNAL AND RELATED DOCUMENTS 479 (Linda Grant DePauw et al. eds., 1974) (resignation letter addressed to Vice President Adams); FLOYD RIDDICK, SENATE PROCEDURE: PRECEDENTS AND PRACTICE 787–88 (1974) ("As a rule, [senators'] resignations have been made by letters . . . addressed to the President of the Senate in the earlier instances . . . Today, it is the common practice for the Senator who is resigning to direct a letter not only to the President of the Senate but also to the governor of the State from which the Senator was elected.").

242. Some Framers did express concerns in this vein but they did not carry the day. See *infra* notes 329–54.

All of this is not to say, however, that the Vice President is a *member* of the Senate.²⁴³ He does not represent a state, he cannot speak without approval of the chamber,²⁴⁴ he sits on no committee, he may not introduce legislation, he does not serve a six-year term and he may not vote except to break ties. Of course, Senate staffers and Senate officers, such as the Sergeant at Arms, are not permitted to do any of the above either, but there is no question they are part of the legislative branch.²⁴⁵ Moreover, unlike the Vice President, they do not generally preside²⁴⁶ over the chamber, nor do they break ties. Thus, clearly there exist legislative branch officials besides lawmakers,²⁴⁷ and the Vice President is one of them. Acting Attorney General and later D.C. Circuit Judge Laurence Silberman properly construed the Vice President's standing in the legislative branch when he wrote in 1974, "the Vice President has a unique status in the legislative branch, but not the status of a 'Member' of the Congress within the meaning of the Constitution."²⁴⁸

2. Text and Structure Reflecting the Vice President's Link to the Executive Branch

While there are compelling textual and structural arguments that counsel placing the Vice President within the legislative branch, there are equally persuasive reasons why the Vice President should be considered part of the executive branch. Taken together, both sets of arguments ultimately reflect that the Vice President is part of both political branches, though not part of both simultaneously.

243. See, e.g., WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 131 (1908) (1961 repr. ed.) ("The Vice President is not a member of the Senate.").

244. The Vice President may speak from the chair with the approval of the Senate and has in the past engaged in debate. See, e.g., Memorandum from the Cong. Research Serv. on Participation by Vice President in Debate (undated) (on file with author).

245. See *Gravel v. United States*, 408 U.S. 606, 616–17 (1972).

246. Aside from a situation involving a President Pro Tempore who is not a senator, in one other setting a non-member may preside. See *Rules of the Senate: Appointment of a Senator to the Chair*, COMM. ON RULES & ADMIN., <http://rules.senate.gov/public/index.cfm?p=RuleI> ("In the absence of the Vice President, the Senate shall choose a President pro tempore, who shall hold the office and execute the duties thereof during the pleasure of the Senate and until another is elected or his term of office as a Senator expires In the absence of the Vice President, and pending the election of a President pro tempore, the Acting President pro tempore or the Secretary of the Senate, or in his absence the Assistant Secretary, shall perform the duties of the Chair. . . .").

247. See U.S. CONST. art. I, § 3, cl. 5 ("The Senate shall chuse their other Officers").

248. See Letter from Laurence H. Silberman, Acting Attorney General, to the Hon. Howard W. Cannon, Chairman, Senate Comm. on Rules and Admin., at 6 (Sept. 20, 1974), available at <http://www.fas.org/irp/agency/doj/olc/092074.pdf> [hereinafter Silberman letter]. See also Letter from Richard Henry Lee to Patrick Henry (Sept. 27, 1789), reprinted in 17 DOCUMENTARY HISTORY, *supra* note 142, at 1625 ("[T]he V.P. determined the question This is one of the ill consequences derived from giving a person the right of voting in the Senate who is not a Member of it."); Memorandum for the Vice President from Nicholas deB. Katzenbach, Ass't Attorney General, Office of Legal Counsel, Regarding Constitutionality of the Vice President's Service as Chairman of the National Aeronautics and Space Council (Apr. 18, 1961), at 3, available at <http://www.fas.org/irp/agency/doj/olc/041861.pdf> (last visited on Feb. 26, 2014).

a. Text

First, the Vice President's primary role, indeed his modern day *raison d'être*, is to succeed or to prepare to succeed to the presidency,²⁴⁹ what has been called the "succession function."²⁵⁰ As Vice President Cheney has noted, the Vice President's "basic role . . . is to worry about presidential succession. And . . . [the] job, above all other things, is to be prepared to take over if something happens to the president."²⁵¹ The Vice President does not replace a member of the Senate if there is a vacancy. That the Vice President exists primarily to fill in for the top official in the executive branch—either permanently or temporarily—reflects perhaps his most obvious formal linkage to the executive branch.²⁵² In the context of the succession function, the Vice President has what might be likened to a contingent remainder interest in the executive branch.²⁵³

Second, Article II, primarily the executive branch article, contains numerous provisions that help outline the vice presidency.²⁵⁴ It provides for

249. See U.S. CONST. amend. XXV, §§ 1, 3, 4.

250. See Henry Comstock Maxson, *Political Practice in the Vice Presidency* (1974) (unpublished Ph.D. dissertation, Brown University).

251. Paul Kengor, *Cheney and Vice Presidential Power*, in *CONSIDERING THE BUSH PRESIDENCY* 168 (Gary L. Gregg II & Mark J. Rozell eds. 2004) (quoting Cheney). See also *Estate of Rockefeller v. Comm'r of Internal Revenue*, 762 F.2d 264, 270 (2d Cir. 1985) ("the Vice President's most important task [is] readying himself for the possibility of assuming the Presidency on a moment's notice"); Memorandum from Walter F. Mondale, Vice President-elect, to Jimmy Carter, President-elect, regarding the Role of the Vice President in the Carter Administration (Dec. 9, 1976) (on file with author) ("[T]he most important constitutional obligation of the office [of Vice President] . . . is, being prepared to take over the Presidency").

252. See, e.g., HITE, *supra* note 2, at 16; cf. Joel K. Goldstein, *Constitutional Change, Originalism, and the Vice Presidency*, 16 U. PA. J. CONST. L. 369, 386 (2013).

253. See BLACK'S LAW DICTIONARY 1292 (6th ed. 1990) [hereinafter BLACK'S] (defining "contingent remainder" as an interest "limited to a certain person that his right to the estate depends upon some contingent event in the future."). See also H. DRAPER HUNT, *HANNIBAL HAMLIN OF MAINE: LINCOLN'S FIRST VICE-PRESIDENT* 155 (1969) ("The Vice-President of the United States is essentially a powerless member of the Executive branch with primarily legislative duties and with a contingent remainder in the presidency"); Rion McKissick, *Our Constitutional Fifth Wheel*, 3 VA. L. REV. 181, 185 (1915–16) ("the Vice-President is supposed to be a disconsolate remainderman, not hopeful of attaining his expectancy."); cf. DANIEL MAGIE, *LIFE OF GARRET AUGUSTUS HOBART: TWENTY-FOURTH VICE-PRESIDENT OF THE UNITED STATES* 181 (1910) ("one who filled the office at this time was more than the titular President of the Senate with a reversionary right in the Presidency."); Leonard Schlup & Thomas Sutton, *Garret Augustus Hobart*, in *THE AMERICAN VICE-PRESIDENCY IN THE LAST HALF OF THE NINETEENTH CENTURY: A DOCUMENTARY HISTORY* 209, 210 (Leonard Schlup & Thomas Sutton eds., 2007) (referring to the Vice President as holding "a reversionary right to the presidency."); Garner, *supra* note 216, at 187 (quoting FREDERICK SCOTT OLIVER, *ALEXANDER HAMILTON: AN ESSAY ON AMERICAN UNION* 406 (1906) ("the Vice President has a kind of reversionary interest in the Presidency."); BLACK'S, *supra*, at 1320 (defining "reversionary interest" as "[t]he interest which a person has in the reversion of lands or other property. A right to the future enjoyment of property, at present in the possession or occupation of another."). The author would like to thank Fred Karem for his thoughts in this vein.

254. See HITE, *supra* note 2, at 16; Greenberg, *supra* note 3, at 26; Goldstein, *supra* note

the length of the Vice President's term (as does the Twentieth Amendment). Article II states that "[t]he . . . President of the United States of America. . . shall hold his Office during the Term of four Years . . . together with the Vice President, [who is] chosen for the same Term . . ." ²⁵⁵ The words "together with" clearly tie the Vice President to the President. ²⁵⁶ Thus, the Vice President's term is not a six-year tenure like that of a senator but a four-year one, ²⁵⁷ binding him in this regard to the President and the executive branch. ²⁵⁸ The Twentieth Amendment reinforces this principle. It provides that "[t]he terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators . . . at noon on the 3rd day of January . . ." ²⁵⁹ Here again, the Vice President begins and ends his term at the exact same time as the President (unless, of course, one of them is removed, resigns, is disabled, dies or otherwise leaves a vacancy). ²⁶⁰ He does not begin or end his term at the same time as senators.

Third, the Vice President is obviously attached to the President for electoral and selection purposes. ²⁶¹ The Twelfth Amendment provides that "[t]he Electors shall meet in their respective states and vote by ballot for President and Vice-President." ²⁶² Obviously, as a practical political matter, the Vice President's electoral fortunes are tied to those of the President ²⁶³ as the two are a "package deal" for American voters. ²⁶⁴ The vice presidential candidate does not automatically appear on the ballot alongside his home state senatorial nominee; he appears alongside his party's presidential nominee.

Furthermore, the Vice President is a nationally elected candidate to a national position. ²⁶⁵ He is not elected from a single state like a senator. In

252.

255. U.S. CONST., art. II, § 1, cl. 1. *See also* Goldstein, *supra* note 252.

256. *See* Shannen Coffin, *Biden's Error on the Vice Presidency*, NATIONAL REVIEW ONLINE (Oct. 2, 2008), <http://www.nationalreview.com/corner/171225/bidens-error-vice-presidency/shannen-coffin>.

257. Similarly, under Article I, Section 3, all senators are divided into three separate classes. The Vice President is not part of a Senate Class. *See* U.S. CONST., art. I, § 3, cl. 2.

258. *See, e.g.*, 153 CONG. REC. H7367 (daily ed. June 28, 2007) (quoting Rep. Jackson Lee); *cf.* HITE, *supra* note 2, at 16.

259. U.S. CONST. amend. XX, § 1.

260. *Cf.* HITE, *supra* note 2, at 16.

261. *See, e.g.*, Greenberg, *supra* note 3, at 26; Goldstein, *supra* note 252.

262. U.S. CONST. amend. XII.

263. *See, e.g.*, HITE, *supra* note 2, at 16.

264. Schlesinger, *supra* note 144, at 483–84. Electoral votes for President and Vice President are cast separately, however. *See* U.S. CONST. amend. XII.

265. *See* *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983) ("the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."); *see also* *Clinton v. Jones*, 520 U.S. 681, 711 (1997) (Breyer, J., concurring) (the President "(along with . . . [the] Vice President) is the only official for whom the entire Nation votes."). The author would like to thank Josiah Brownell for his thoughts on this issue.

addition, electors choose the Vice President.²⁶⁶ Electors do not choose senators; the voters in each state directly do so.²⁶⁷

In the case of a vice presidential vacancy, the President nominates a new Vice President subject to bicameral confirmation.²⁶⁸ The Congress does not nominate him; the Framers of the Twenty-Fifth Amendment rejected such a scenario.²⁶⁹ And, as a practical matter, presidential candidates select their running mates subject to approval by delegates at their respective party conventions. Vice presidential candidates are not chosen by senatorial candidates subject to party approval.

Fourth, Article II²⁷⁰ governs removal of the Vice President, not Article I as it does for federal lawmakers. Article II, Section 4 provides that “[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”²⁷¹ This would seem to mark the Vice President as an executive branch official since federal lawmakers are not thought to be subject to impeachment.²⁷² In this respect, the upper chamber does not expel the Vice President, as it does a senator.²⁷³ For senators, as will be recalled, Article I governs removal: “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.”²⁷⁴

Finally, when determining presidential inability under the Twenty-Fifth Amendment, the Vice President must gain the approval of the President’s cabinet (or they must gain the Vice President’s approval), prior to a determination being sent to Congress for its disposition. The opposite does not occur; the Vice President does not first gain the approval of Congress and then go to the Cabinet.²⁷⁵ It will be recalled that the Twenty-Fifth Amendment provides:

266. See LEVINSON, *supra* note 2, at 227.

267. See U.S. CONST. amend. XVII.

268. See *id.* amend. XXV, § 2 (“[W]henver there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.”).

269. See, e.g., JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* 233–35 (1982).

270. See, e.g., Goldstein, *supra* note 252.

271. U.S. CONST. art. II, § 4.

272. See, e.g., Silberman letter, *supra* note 248, at 6 (noting that, like the chief executive, the Vice President can be impeached and removed). In the late eighteenth century, Senator William Blount was impeached but acquitted and this example of impeaching federal legislators has not been followed. See, e.g., EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT* 88 (1999).

273. See Friedman, *supra* note 235, at 1721.

274. U.S. CONST. art. I, § 5, cl. 2.

275. “Cabinet” in this context is short hand for the “principal officers of the executive departments,” the language used in the Twenty-Fifth Amendment. See *Freytag v. Comm’r*, 501 U.S. 868, 886–87 (1991); see also Scott E. Gant, *Presidential Inability and the Twenty-Fifth*

[w]henever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.²⁷⁶

This decision making process implies yet another vice presidential affiliation with the executive branch.²⁷⁷ In this regard, the Vice President plays a pivotal role in the proper functioning of the executive branch. Without him, an incapacitated President could hobble the executive branch. Clearly, the Vice President is considered part of the executive branch in the context of the Twenty-Fifth Amendment.²⁷⁸

b. Structure

There are also at least six structural arguments that support the Vice President being considered part of the executive branch, at least part of the time. First, the qualifications for Vice President mirror those of the President, not those of federal lawmakers.²⁷⁹ The Twelfth Amendment states that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”²⁸⁰ Those qualifications include that:

[n]o person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty

Amendment’s Unexplored Removal Provisions, 1999 MICH. ST. U. DET. C.L. L. REV. 791, 794 n.12.

276. U.S. CONST. amend. XXV, § 4. Notably, the Vice President’s role in the original inability provision appeared under Article II, Section 1, Clause 6, *not* under Article I. It stated:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

277. *See, e.g.*, Vikram David Amar, *The Cheney Decision—A Missed Chance to Straighten Out Some Muddled Issues*, 2004 CATO SUP. CT. REV. 185, 207.

278. *See, e.g.*, Goldstein, *supra* note 4, at 508 (“The Twenty-fifth Amendment expressed a new vision of the vice presidency fundamentally different from that embodied in the initial Constitution [It] recognized constitutional changes that had occurred in the vice presidency, especially during the previous few decades. The amendment gave those changes enhanced standing by incorporating them into its underlying vision.”); *see also* Amar, *supra* note 277. That said, while the Twenty-Fifth Amendment provides an additional textual link to the executive branch, it did not amend or sever the Vice President’s textual ties to the legislative branch under Article I.

279. *See, e.g.*, Goldstein, *supra* note 252.

280. U.S. CONST. amend. XII.

five Years, and been fourteen Years a Resident within the United States.²⁸¹

Article I, on the other hand, provides that “[n]o Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.”²⁸²

The qualifications for President, therefore, point toward the Vice President being part of the executive branch. An individual may become a senator between the ages of thirty and thirty-five, but not the President of the Senate. He must be thirty-five or older. By the same token, a foreign-born citizen may serve as a senator but may not as Vice President.

A second factor related to the Vice President’s link to the executive branch involves the Vice President’s resignation. As noted earlier, when the Vice President takes this step he is required to send a letter to the secretary of state, not to the President Pro Tempore or the Senate as a whole.²⁸³ Submission of a letter to the secretary of state is the same procedure that governs presidential resignation. Moreover, this provision is found in a statute from 1792, just a few years after the inauguration of the Constitution. Accordingly, this statutory provision is likely of some constitutional import, as it may be considered “contemporaneous construction”²⁸⁴ by the Framers and their peers, and thus entitled to deference. Here again, the Vice President’s departure—as with his election—is tied to the executive branch.

Third, Article VI of the Constitution could be read as meaning that the Vice President is part of the executive branch. It provides that “[t]he Senators and Representatives . . . and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”²⁸⁵ This language tacitly limits those in the legislative branch to senators and representatives. In this way, Article VI lists

281. *Id.* art. II, § 1, cl. 4.

282. *Id.* art. I, § 3, cl. 3.

283. *See* 3 U.S.C. § 20; *cf.* Friedman, *supra* note 235, at 1731 n.110 (noting that the Vice President must submit his resignation to the Secretary of State, not a legislative branch official); *see also* Everett S. Brown, *The Resignation of President and Vice-President*, 22 AM. POL. SCI. REV. 732 (1928).

284. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. 539, 620–21 (1842) (emphasizing the importance of “contemporaneous exposition of” the Constitution by the Framers); Ogden v. Saunders, 25 U.S. 213, 290 (1827) (“[C]ontemporaries of the Constitution have claims to our deference . . . because they had the best opportunities of informing themselves of the understanding of the framers of the Constitution and of the sense put upon it by the people when it was adopted by them”); Stuart v. Laird, 5 U.S. 299, 309 (1803) (“[I]t is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer and have indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled.”).

285. U.S. CONST. art. VI, cl. 3. For more on the vice presidential oath, see Henry Barrett Learned, *The Vice-President’s Oath of Office*, 104 THE NATION 248 (1917).

“Senators and Representatives” as a category and then turns more broadly to “all executive and judicial officers.” In this regard, “Senators and Representatives” could be seen to constitute all legislative branch personnel.²⁸⁶ At the same time, the seemingly more inclusive term “executive and judicial officers” is used with respect to the executive and judicial branches. This more expansive reference to those who must take an oath in the magisterial branches would seem the most logical place in this context to include the Vice President. Obviously, the Vice President is not a member of the judicial branch,²⁸⁷ therefore, under this structural formulation, he would have to be part of the executive establishment.

Fourth, a similar argument could be based on Article I and the Seventeenth Amendment. The former provides that “[t]he Senate of the United States shall be composed of two Senators from each State”,²⁸⁸ such a formulation apparently leaving no room for the Vice President. The President of the Senate Clause provides that the Vice President does not vote unless “*they* be equally divided.”²⁸⁹ The word “they” clearly refers to senators and conveys that the Vice President is not a senator. By the same token, the Seventeenth Amendment also implies the Vice President is not a senator. It provides that “[e]ach Senator shall have one vote.”²⁹⁰ That could be read to mean that only senators can vote. In this view, it is worth recalling that the Senate is “composed of” one hundred senators and no one else. Consequently, it could be argued that the Vice President is not truly “of” the Senate. Taken to its logical conclusion, that would mean that, since the Vice President cannot be within the Senate, he cannot be part of the legislative branch and therefore must be part of the executive branch.²⁹¹ This dovetails with the language of Article VI, which likewise appears to limit the legislative branch to senators and representatives.

However, the context of these provisions almost assuredly implies actual *membership* in the body and not the issue of broader affiliation with the chamber. No one would seriously claim that the Vice President is actually a senator. As noted earlier, Senate officers are clearly “part of” the Senate, even

286. *But see* U.S. CONST. art. I, § 3, cl. 5 (“The Senate shall chuse their other Officers.”).

287. *See supra* note 6.

288. U.S. CONST. art. I, § 3, cl. 1. *See also* Friedman, *supra* note 235, at 1721; Garvey, *supra* note 3, at 583.

289. U.S. CONST. art. I, § 3, cl. 4 (emphasis added).

290. *See id.* amend. XVII; *see also* Garvey, *supra* note 3, at 583. The counter is that the Vice President is expressly authorized elsewhere by the Constitution to vote to break ties, even though he is not a senator. *See* U.S. CONST. art. I, § 3; *see also* Friedman, *supra* note 235, at 1721 n.74.

291. Implicit in this argument is that the Vice President must be part of one of the three branches of government. *See, e.g.,* United States v. Nixon, 418 U.S. 683, 707 (1974) (emphasis added) (“In designing the structure of our Government [the Framers] . . . divid[ed] and allocat[ed] the sovereign power among three co-equal branches [thereby] . . . provid[ing] a *comprehensive* system . . .”). For a further discussion, *see* Brownell, *supra* note 5.

if they are not senators. And they too are mentioned in constitutional text.²⁹² Congressional staff, who number in the thousands, are legally treated as “alter egos” of members and enjoy legislative branch protections under the Speech or Debate Clause.²⁹³ And they, unlike officers, are nowhere mentioned in constitutional text. Surely, if Senate staff are part of the legislative branch, but are omitted from constitutional text, then the President of the Senate, who is expressly mentioned in the charter in conjunction with the Senate, should also be so categorized, at least part of the time.

Fifth, another structural feature hinting that the Vice President is part of the executive branch at least some of the time concerns use of the term “office” under the Constitution.²⁹⁴ A careful reading of text reveals that the presidency is repeatedly referred to as “the Office of President.”²⁹⁵ Article I states that “[t]he Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise *the Office of President of the United States.*”²⁹⁶ Article II provides that “[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to *the Office of President.*”²⁹⁷ Similarly, the Twelfth Amendment reads: “no person constitutionally ineligible to *the office of President* shall be eligible to that of Vice-President of the United States.”²⁹⁸ The Twenty-Second Amendment follows the same pattern:

No person shall be elected to *the office of* the President more than twice, and no person who has held *the office of* President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to *the office of* President more than once. But this Article shall not apply to any person holding *the office of* President when this Article was proposed by Congress, and shall not prevent any person who may be holding *the office of* President, or acting as President, during the term within which this Article becomes operative from holding *the office of* President or acting as President during the remainder of such term.²⁹⁹

Under the Constitution, only one other position is introduced with the words “the office of” and that is the vice presidency. Section 2 of the Twenty-Fifth Amendment begins with the phrase “[w]henver there is a vacancy in *the office of* the Vice President.”³⁰⁰ The Twelfth Amendment implicitly does the same

292. See U.S. CONST. art. I, § 3, cl. 5.

293. See *Gravel v. United States*, 408 U.S. 606, 616–17 (1972).

294. This insight resulted from a conversation with Seth Barrett Tillman.

295. See, e.g., U.S. CONST. art. I, § 3, cl. 5.

296. *Id.* (emphasis added).

297. *Id.* art. II, § 1, cl. 4 (emphasis added).

298. *Id.* amend. XII (emphasis added).

299. *Id.* amend. XXII (emphases added).

300. U.S. CONST. amend. XXV, § 2 (emphasis added).

when it provides that “no person constitutionally ineligible to *the office of* President shall be eligible to *that of* Vice-President of the United States.”³⁰¹

Since the textual formulation “the office of” repeatedly introduces the President—and does not introduce those who are solely part of the legislative and judicial branches—it would appear to carry with it the implication that the position in question is an executive branch post. Such careful distinctions in constitutional language should not be lightly dismissed.³⁰²

Sixth, simply because the Vice President presides over the Senate does not *preclude* his being a part of the executive branch. In the modern era, the Senate is not continually in session, leaving ample time for the Vice President hypothetically to preside over the Senate and carry out a full complement of executive branch duties.³⁰³ Indeed, for much of its history, the Senate was out of session most of the year. A related point involves the Chief Justice. The Chief Justice presides over Senate deliberations during an impeachment trial of the President, filling in for the Vice President. Yet, few would maintain that because of this role—the only one expressly assigned to him by the Constitution—the Chief Justice is solely part of the legislative branch and not part of the judiciary.³⁰⁴ Comparable logic would seem to govern with regard to the Vice President and his relationship to the executive branch.

3. Text Reflecting the Vice President’s Link to Both Political Branches

Finally, one textual provision indicates that the Vice President is part of both elected branches, but not both at the same time. Article I, Section 3 of the Constitution—the President Pro Tempore Clause—provides that “[t]he Senate shall chuse . . . a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.”³⁰⁵ This language suggests that the Senate must always have a presiding officer and that the Vice President surrenders that status when he leaves the Senate, either for a routine absence, to fulfill delegated duties within the executive branch³⁰⁶ or to

301. *Id.* amend. XII (emphasis added). See also 2 FARRAND, *supra* note 35, at 537 (noting “the office of vice-President”).

302. See, e.g., *Holmes v. Jennison*, 39 U.S. 540, 571 (1840) (“[N]o word [in the Constitution] was unnecessarily used or needlessly added Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning”).

303. As a matter of practice, the Vice President spends little time presiding, hence the hypothetical.

304. Indeed, unlike the Chief Justice’s relationship to the judicial branch, the Vice President has numerous textual ties to the executive branch.

305. U.S. CONST. art. I, § 3, cl. 5. The author would like to thank Joel Goldstein for raising this point.

Article I, Section 3 provides that in two circumstances the President Pro Tempore shall preside over the Senate. One is when the Vice President is acting as President. The other is “in the Absence of the Vice President.” See U.S. CONST. art. I, § 3, cl. 5.

306. See HITE, *supra* note 2, at 15.

assume the presidency. It also demonstrates that the Vice President may not carry out constitutional functions in both political branches at the same time; after all, he cannot carry out his legislative branch powers outside of the Senate chamber.

Radiating in turn from that premise is that when working for the President—and absenting himself from the Senate in the process—the Vice President is not part of the legislative branch and the Senate must take action to make up for his absence by electing a President Pro Tempore. Similarly, when the Vice President acts as President and becomes a full-time executive branch official, he is no longer linked to the legislative branch. In short, he can be in the Senate chamber, be Senate President and be part of the legislative branch or, when leaving the chamber, revert to the executive branch. Indeed, this provision is the textual and structural keystone that links the provisions tying the Vice President to the legislative branch with those tying him to the executive branch.

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In sum, there are textual provisions and structural factors in the Constitution that support the Vice President being considered part of both elected branches. Therefore, arguing that he belongs only to one branch discounts altogether a host of constitutional clauses and interrelationships, doing violence to both text and structure. The most logical means of reconciling text and structure is by looking at the context in which the Vice President is taking action.

B. The Constitutional Convention and the Views of the Original Framers

What the original Framers of the Constitution had in mind about the role of the Vice President is in no small part a matter of conjecture.³⁰⁷ They were largely silent about their handiwork. One author described the original Framers' treatment of the vice presidency as "a hasty postscript"³⁰⁸ as formulation of the position was not undertaken until late in the Convention's deliberations.³⁰⁹ A few generalizations, however, can be hazarded. First, a government official straddling more than one branch of government was certainly not alien to the Anglo-American legal tradition, as it existed at the time. The Lord Chancellor in Great Britain was the senior judge in the land as

307. See, e.g., GOLDSTEIN, *supra* note 269, at 4. For a brief but well documented summary of the ratification debates involving the vice presidency, see Medina, *supra* note 185, at 85–86.

308. EDGAR WIGGINS WAUGH, *SECOND CONSUL: THE VICE PRESIDENCY: OUR GREATEST POLITICAL PROBLEM* 25 (1956).

309. See, e.g., Joel K. Goldstein, *An Overview of the Vice-Presidency*, 45 *FORDHAM L. REV.* 786, 789 (1976–77). For example, neither the Virginia Plan nor the New Jersey Plan made any reference to an official who would take over following death or removal of the executive. See RUTH SILVA, *PRESIDENTIAL SUCCESSION* 4 (1951). Alexander Hamilton and Charles Pinckney did, however, draft plans that included provisions for succession, but they did not include a Vice President. See *id.*

well as the presiding officer of and a member of the House of Lords.³¹⁰ Many state charters also permitted officers to serve in multiple branches.³¹¹ Early drafts of the Constitution had an intermixture of officials. The Virginia Plan, for instance, proposed a Council of Revision that would have reviewed bills that passed the legislature; it was to be made up of the executive and members of the Judiciary.³¹² A later plan had the Chief Justice serving within a cabinet-like body called the Council of State, which was to advise the President on policy matters.³¹³ At one point, the Chief Justice was slated to succeed the President.³¹⁴ Seen in this context, it is less difficult to envision the Vice President straddling two branches of government.

Second, since the Framers did not anticipate political parties, they set up a system whereby a member of the Electoral College would vote for two candidates for President, with the caveat that only one could hale from the same state as the elector.³¹⁵ This precaution therefore prevented each state from voting only for its own “favorite son,”³¹⁶ and attempted to ensure that an individual of national stature was chosen President.³¹⁷ Of the top two presidential candidates, the one garnering the majority of electoral votes would become chief executive and the one with the second-most electoral votes would become Vice President.³¹⁸ The Twelfth Amendment modified this arrangement after the election of 1800 almost made Aaron Burr—the clear vice presidential candidate for the Jeffersonian party—President instead of Vice President.

Third, the Framers were concerned about presidential succession even if the vice presidency was a late addition to the constitutional mix.³¹⁹ As noted, a

310. See, e.g., 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 538 (Jonathan Elliot ed., 1836) (reprint 1937) [hereinafter 2 ELLIOT] (quoting Thomas McKean). For more on the Lord Chancellor’s ambiguous position within the English Constitution, see, e.g., A.F. POLLARD, THE EVOLUTION OF PARLIAMENT 21–23, 250–51 (2d rev. ed. 1964); *infra* note 337.

311. The New York state constitution of 1777 and the South Carolina state constitution of 1776 both permitted officials to serve in more than one branch of government. See Calabresi & Larsen, *supra* note 60, at 1058. The New York lieutenant governor’s office may have been a particularly influential state model for the Framers. See, e.g., Soderstrom, *supra* note 2, at 982–83, 989–90; James Monroe, *A Native of Virginia, Observations upon the Proposed Plan of Federal Government*, in THE WRITINGS OF JAMES MONROE (Stanislaus Murray Hamilton ed., 1903) available at http://press-pubs.uchicago.edu/founders/documents/a1_3_4-5s2.html; *infra* note 319.

312. See 1 FARRAND, *supra* note 148, at 21.

313. See 2 FARRAND, *supra* note 35, at 335.

314. See *id.*

315. See Goldstein, *supra* note 309.

316. See *id.* In this same vein, Joel Goldstein has argued that the Framers established the vice presidency to increase the likelihood that capable presidents would be elected. See Goldstein, *supra* note 4, at 512–13.

317. See, e.g., Schlesinger, *supra* note 144, at 489.

318. See Goldstein, *supra* note 309.

319. See THE FEDERALIST NO. 68, at 347 (Alexander Hamilton) (Garry Wills ed., 1982) (“The other consideration is, that as the vice-president may occasionally become a substitute for

preliminary draft of the Constitution had the Chief Justice filling in for the fallen executive.³²⁰ Still others had the President of the Senate so serving (at that point during the constitutional drafting process the Vice President had yet to be introduced).³²¹

Fourth, there was the question of who would preside over the Senate.³²² This involved two related issues, one being the concern that, if the presiding officer was a senator, he could not cast a vote, and one state would have diminished representation.³²³ The other was that, since the Constitution provided for two senators per state, the body's membership would always be evenly numbered. Consequently, the Framers thought that the Senate might become regularly deadlocked and unable to arrive at decisions.³²⁴ As a consequence, the Vice President was tasked with presiding over the Senate, presumably to permit all the senators to have a vote and to allow ties to be broken, thus alleviating these apprehensions.³²⁵

With regard to the specific question discussed in this article and its companion—to which branch or branches does the Vice President belong—the picture painted by the original Framers is somewhat mixed. Some saw the Vice President as part of both political branches.³²⁶ Some believed him to be

the president, in the supreme executive magistracy, all the reasons, which recommend the mode of election prescribed for the one, apply with great, if not with equal, force to the manner of appointing the other. It is remarkable, that in this as in most other instances, the objection, which is made, would be against the constitution of this State [New York]. We have a Lieutenant Governor chosen by the people at large, who presides in the senate, and is the constitutional substitute for the Governor in casualties similar to those, which would authorise the vice-president to exercise the authorities and discharge the duties of the president.”)

320. See 2 FARRAND, *supra* note 35, at 335, 342; see also Goldstein, *supra* note 309; cf. 2 FARRAND, *supra* note 35, at 427.

321. See 1 FARRAND, *supra* note 148, at 292, 300; 2 FARRAND, *supra* note 35, at 146, 172, 186; 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 47 (Max Farrand ed., 1966); SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 190 (James H. Hutson ed., 1987). See also Goldstein, *supra* note 309.

322. See also Goldstein, *supra* note 309.

323. See 2 FARRAND, *supra* note 35, at 537. See also Goldstein, *supra* note 309.

324. See Goldstein, *supra* note 309.

325. See *id.*; THE FEDERALIST NO. 68, *supra* note 319, at 347 (“The appointment of an extraordinary person, as vice president, has been objected to as superfluous, if not mischievous. It has been alledged, that it would have been preferable to have authorised the senate to elect out of their own body an officer, answering that description. But two considerations seem to justify the ideas of the convention in this respect. One is, that to secure at all times the possibility of a definite resolution of the body, it is necessary that the president should have only a casting vote. And to take the senator of any state from his seat as senator, to place him in that of president of the senate, would be to exchange, in regard to the state from which he came, a constant for a contingent vote.”).

326. The view that the Vice President is part of both elected branches has an overlooked, potential, Originalist component. Many of the Framers viewed the Senate not only as a legislative branch body but also as an executive council of sorts. See, e.g., *Washington letter*, *supra* note 35 (“The President has the ‘power by and with the advice and consent of the Senate, to make treaties and to appoint Officers.’ The Senate when these powers are exercised, is evidently a Council only to the President, however [necessary] its concurrence may be to his Acts”); 2

exclusively part of the legislative department.³²⁷ None, however, seemed to argue that the position was solely an executive branch post.³²⁸

ELLIOT, *supra* note 310, at 287 (Livingston) (referring to the Senate “in their capacity of council to the President”). This view is demonstrated by the term of art used for Senate involvement in functions that are thought to be functionally executive: treaties and nominations. “Advise and consent” is used in this context and not “vote” as is used in functionally legislative contexts. Those who give “advice” are by definition advisors. Advisors imply a council-type setting. In this respect, it bears remembering that, under the Constitution, there is no explicit provision for a cabinet and the original Senate was a small body.

Viewing the Senate in this light—as an executive council as well as a legislative chamber—helps clarify why the Vice President may have been chosen to preside over the body. If the Senate was meant to serve as an executive council of sorts, then it would make perfect sense for the Vice President to chair that body; for all the reasons it makes sense to have the Vice President sit in on Cabinet meetings today (i.e., the successor to the presidency should be well-informed about matters of state). *See, e.g.*, THOMAS E. CRONIN & MICHAEL A. GENOVESE, *THE PARADOXES OF THE AMERICAN PRESIDENCY* 319 (1998) (“The Senate was designed in many ways as an ideal place for a vice president to learn the business of government and to serve along with the nation’s leading thinkers.”); JAMES THOMAS FLEXNER, *GEORGE WASHINGTON AND THE NEW NATION (1782–1793)*, at 213 (1970) (“the Constitution made John Adams presiding officer of the Senate [and] there was nothing in the document to keep him from also becoming, in effect, the President’s prime minister.”); *cf.* 2 FARRAND *supra* note 35, at 146, 172, 186. In fact, earlier drafts of the Constitution had the President of the Senate serving as the successor to the chief executive even before the convention had created the vice presidency. *See, e.g., id.* (including the President of Senate in a constitutional executive council). Since the Senate can be viewed as fulfilling both functional executive and legislative roles, then that state of affairs could be seen as consistent with a construction of the vice presidency being part of both political branches. As noted earlier, *see supra* Part II.A., functional powers and branch membership are closely related but not coextensive concepts under the U.S. Constitution.

This theory finds some support from at least one of the Framers. *See* James Iredell, Marcus, *Answers to Mr. Mason’s Objections to the New Constitution, 1788*, available at http://press-pubs.uchicago.edu/founders/documents/a2_1_1s9.html (“The President of the United States has no constitutional Council (a thing unknown in any safe and regular government) The President of such a Council might have acted as Vice-President of the United States, *pro tempore*, upon any vacancy or disability of the Chief Magistrate, and long-continued sessions of the Senate would in a great measure have been prevented. From this fatal defect of a constitutional, Council has arisen the improper power of the Senate, in the appointment of public officers, and the alarming dependence and connection between that branch of the legislature and the Supreme Executive. Hence also sprung that unnecessary and dangerous officer, the Vice-President of the Senate; thereby dangerously blending the Executive and Legislative powers; besides always giving to some one of the States an unnecessary and unjust pre-eminence over the others.”).

327. *See, e.g.*, Joel K. Goldstein, *The Vice Presidency and the Twenty-Fifth Amendment: The Power of Reciprocal Relationships*, in *MANAGING CRISIS: PRESIDENTIAL DISABILITY AND THE 25TH AMENDMENT* 165, 174 (Robert E. Gilbert ed., 2000) (The Framers “conceived the vice presidency as essentially a legislative office.”).

328. Thomas McKean noted that some who opposed the Constitution claimed “the Vice President . . . [was] an executive officer . . .” 2 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 534 (Merrill Jensen ed., 1976) [hereinafter 2 *DOCUMENTARY HISTORY*]. He named no names however. In *The Federalist* No. 68, Alexander Hamilton briefly analyzed the vice presidency. *See THE FEDERALIST* NO. 68, *supra* note 319. Interestingly, he placed his examination of the office within an essay analyzing the presidency and not Congress, implicitly associating the Vice President with the President. *See* Greenberg, *supra* note 3, at 4, 28.

During the Convention and the Ratification debates, there was apparently some discussion of where the position fit within the constitutional structure. Several of the voices raised regarding the vice presidency viewed it as part of both political branches of government. One of those to opine on the subject was George Mason, who did not vote to approve the Constitution.³²⁹ He commented at the Convention that the Vice President is an “unnecessary (and dangerous) officer . . . who . . . is made president of the Senate, thereby dangerously blending the executive and legislative powers.”³³⁰ He also observed that he “thought the office of Vice-President an encroachment on the rights of the Senate; and that it mixed too much the Legislative & Executive, which, as well as the Judiciary departments, ought to be kept as separate as possible.”³³¹ At the Virginia Ratification Convention, Mason repeated these criticisms: “the Vice-President . . . is, contrary to the usual course of parliamentary proceedings, to be president of the Senate. . . . the legislative and executive are hereby mixed and incorporated together.”³³² Mason apparently saw the vice presidency—even prior to subsequent constitutional amendment and institutional evolution—as being part of both elected branches and exercising both functional legislative and executive power.

Elbridge Gerry held similar views and, like Mason, did not favor adoption of the new charter.³³³ The future Vice President remarked at the Convention that “[w]e might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President & vice-president makes it absolutely improper.”³³⁴ He also opined that “[t]he V.P destroys the Independence of the Legislature.”³³⁵ Gerry would not have been concerned about the independence of Congress if he saw the Vice President as being solely part of the legislative branch.

At the time of the New York Ratification debates, another future Vice President, George Clinton, wrote as *Cato*. He argued the vice presidency represented a merging of functional power, if not branches per se. Clinton

329. See, e.g., Greenberg, *supra* note 3, at 3.

330. 2 FARRAND, *supra* note 35, at 639. For an assessment of Mason’s views on the vice presidency, see *Letter from James Madison to George Washington* (Oct. 18, 1788), reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION BY THE STATES 76 (John P. Kaminski et. al eds., 1988) (characterizing one of George Mason’s concerns with the draft constitution as “the appointment of the Vice President—President of the Senate instead of making the President of the Senate the Vice President, which seemed to be the alternative . . .”).

331. 2 FARRAND, *supra* note 35, at 537. For an apparently similar assessment, see *Letter from Caleb Wallace to William Fleming* (May 3, 1788), reprinted in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION BY THE STATES 781, 782 (John P. Kaminski et. al eds., 1990) (“[O]ur American sages have erred. The complication of powers and prerogatives they have heaped on the Senate President and Vice President are intolerable.”).

332. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 486–87 (Jonathan Elliot ed., 1937).

333. See, e.g., Greenberg, *supra* note 3, at 2.

334. 2 FARRAND, *supra* note 35, at 536–37 (Gerry).

335. *Id.* at 635.

offered that “[t]he establishment of a vice-president is as unnecessary as it is dangerous. This officer, for want of other employment, is made president of the senate, thereby blending the executive and legislative powers”³³⁶

During the Pennsylvania Ratifying Convention, Thomas McKean implicitly recognized the Vice President’s hybrid status. He analogized the Vice President to the presiding officer of Great Britain’s House of Lords.³³⁷ In defending the Vice President’s unique role, he observed that “[t]he chancellor of England is a judicial officer; yet he sits in the House of Lords.”³³⁸ McKean noted that “the Vice President . . . being an executive officer, is to be President of the Senate”³³⁹

At the same convention, Robert Whitehill also seemed to conceive the Vice President as being part of both political branches. One contemporary account notes that Whitehill claimed the Vice President “blends the legislative and executive departments.”³⁴⁰ Another has him pronouncing that the Vice President “will be more blended with the legislature”³⁴¹

Other Framers appeared to acknowledge that the Vice President was within the legislative branch and, if he was not actively part of the executive branch, he at least enjoyed what amounted to a contingent interest in the latter. The *Federal Farmer* contended that “[t]he vice-president is not a very important, if not an unnecessary part of the system—he may be part of the senate at one period, and act as the supreme executive magistrate to another.”³⁴² Richard Henry Lee took a similar position. “[The] vice-president

336. *The Letters of Cato*, reprinted in *THE ANTIFEDERALISTS* 302, 305, Nov. 8, 1787 (George Clinton) (Cecelia M. Kenyon repr. ed., 1985); *cf. id.* at 302 (“The executive power as described in the 2d article, consists of a president and vice-president . . .”).

337. 2 DOCUMENTARY HISTORY, *supra* note 328, at 544 (quoting Thomas McKean) (“The Vice President’s office is grounded on the practice in England.”). The Lord Chancellor holds a similarly ambiguous position in English constitutional structure. *See* LUKE OWEN PIKE, A CONSTITUTIONAL HISTORY OF THE HOUSE OF LORDS 354 (1894) (“[I]n accordance with the practice of centuries, the Chancellor’s presence in Parliament was *ex officio* He has for centuries been regarded, whether Peer or commoner, as the Speaker or Prolocutor of the House. His place on the woosack is now usually said to be not technically within the House, though it is difficult to reconcile this opinion with the plain words of the Act of Henry VIII, that the seat is ‘in the midst of the Parliament Chamber.’”); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 735, at 209–10 (1833) (In the context of the Vice President, “[t]here is no novelty in the appointment of a person to preside, as speaker, who is not a constituent member of the body, over which he is to preside. In the house of lords in England the presiding officer is the lord chancellor, or lord keeper of the great seal, or other person appointed by the king’s commission . . . it is by no means necessary, that the person appointed by the king should be a peer of the realm or lord of parliament.”).

338. 2 ELLIOT, *supra* note 310, at 538.

339. 2 DOCUMENTARY HISTORY, *supra* note 328, at 534 (quoting Thomas McKean).

340. *Id.* at 512.

341. *Id.*

342. 3 *Letter from the Federal Farmer* (Oct. 10, 1787), reprinted in 1 *THE DEBATE ON THE CONSTITUTION: FEDERALIST, ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE FOR RATIFICATION* 259, 263 (1993) [hereinafter *DEBATES*].

is sometimes to be joined with the legislature, and sometimes to administer the government”³⁴³ He bemoaned the potential in the Constitution for the “[o]ligarchic . . . combination . . . [of the] President, V. President, & Senate”³⁴⁴

On the other hand, several Framers seemed to characterize the position as solely a legislative branch post. Roger Sherman left little room for doubt where he stood. He stated that “[i]f the vice-President were not to be President of the Senate, he would be without employment”³⁴⁵ He echoed this sentiment during the Ratification debates in Connecticut. “The Vice-President while he acts as President of the Senate will have nothing to do in the executive department”³⁴⁶ Sherman did not see the Vice President as having any active executive branch ties whatsoever.

Oliver Ellsworth, future Chief Justice of the United States, disputed that the vice presidency reflected an improper merging of the executive and legislative branches. In so doing, he made clear he saw a sitting Vice President to be exclusively part of the legislative branch. Ellsworth contended that “[t]he vice-president is not an executive officer while the president is in discharge of his duty, and when he is called to preside his legislative voice ceases. In no other instance is there even the shadow of blending or influence between the two departments.”³⁴⁷

Tench Coxe was a prominent Pennsylvanian who would later serve in executive branch capacities under the first three presidents. He briefly discussed the vice presidency in a pamphlet when the commonwealth was considering ratification of the Constitution. In a piece entitled *An American Citizen I*, he wrote that “our vice-president, who is chosen *by the people* through electors and the senate, *is not at all dependent on the president*, but may exercise equal powers on some occasions.”³⁴⁸ In addition to implying the Vice President’s independence from the President while serving as presiding officer of the Senate, Coxe—like Sherman and Ellsworth—did not perceive the

343. Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1788), reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 61, 66 (John P. Kaminski et al. eds., 1988).

344. 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 324 (John P. Kaminski et al. eds., 1981) (quoting a letter from Richard Henry Lee to Samuel Adams, Oct. 5, 1787). See also WIRLS & WIRLS, *supra* note 7, at 143.

345. 2 FARRAND, *supra* note 35, at 537 (Sherman).

346. Roger Sherman, *A Citizen of New Haven*, THE NEW HAVEN GAZETTE, Dec. 4, 1788, reprinted in THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 607, 613 (E.H. Scott ed., 1898).

347. Oliver Ellsworth, *A Landholder*, THE CONNECTICUT COURANT, Dec. 3, 1787, reprinted in THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS, *supra* note 346, at 570, 573.

348. Tench Coxe, *An American Citizen I*, INDEPENDENT GAZETTEER (Phila.), Sept. 26, 1787, reprinted in THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 20, 23 (Bernard Bailyn ed., 1993).

Vice President to be part of the executive establishment. Instead, Coxe tacitly viewed the Vice President as solely within the legislative branch.

Writing as *Cincinnatus* in 1787, one contemporary noted the close relationship between the Vice President and the Senate.³⁴⁹ He observed:

The *union* established between them [senators] and the vice president, *who is made one of the corps*, and will therefore be highly animated with the aristocratic spirit of it, furnishes them [senators] a powerful shield against popular suspicion and enquiry, he being the second man in the United States who stands highest in the confidence and estimation of the people.³⁵⁰

Other early observers apparently not only interpreted the Vice President as being part of the legislative branch, but went so far as to contend he was in fact a senator. Reverend James Madison, President of the College of William and Mary, wrote to his esteemed cousin of the same name that the Constitution should be amended in this respect. “Let the Senate be entirely confined to the object of Legislation, let not one of its Members be styled Vice-President.”³⁵¹

Still others were utterly perplexed about the position and how the Vice President was to serve in the Senate. They were less persuaded than Sherman and Ellsworth that the Vice President was exclusively part of the legislative branch. At the North Carolina Ratifying Convention, David Caldwell noted the ambiguity caused by the Vice President’s role in the legislative branch. He commented on the incongruity of “the Vice-President [being] . . . *made a part of the legislative body*, although there was an express declaration, that all the legislative powers were vested in the Senate and House of Representatives.”³⁵² Caldwell observed, “that all the legislative powers granted by this Constitution are not vested in a Congress . . . because the Vice-President has a right to put a check on it. How can all the legislative powers granted in that Constitution be vested in the Congress, if the Vice-President is to have a vote in case the Senate is equally divided?”³⁵³

349. See *Cincinnatus IV to James Wilson* (Nov. 22, 1787), reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE 186 (John P. Kaminski et al. eds., 1983).

350. *Id.* at 188 (emphasis added).

351. *Letter from Rev. James Madison to James Madison* (Aug. 15, 1789), reprinted in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES 1321, 1322 (Charlene Bangs Bickford et al. eds., 2004); cf. *James Read to George Read*, reprinted in *id.* at 1360 (“I cannot see the necessity of any great distinction being made between him [the Vice President] and the other Senators . . .”).

352. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 26 (Jonathan Elliot ed., 1836) (reprt. 1937) [hereinafter 4 ELLIOT] (emphasis added). See also FEERICK, *supra* note 2, at 53.

353. 4 ELLIOT, *supra* note 352, at 26. See also Greenberg, *supra* note 3, at 31. That clause, like all others, cannot be read in isolation from the rest of the Constitution. The Vice President’s legislative branch role, like congressional authority to make laws, is provided in the text of the charter. As such the two provisions must be read in such a manner to give both full effect. See *infra* Part III.D. A similar question could be raised about the presidency. He also exercises

Archibald Maclaine attempted to answer Caldwell's query, but his reply did not fully assuage the concerns of his fellow delegates. The debate reporter noted that others:

were dissatisfied with Mr. Maclaine's explanation—that the Vice-President was not a member of the Senate, but an officer of the United States, and yet had a legislative power, and that it appeared to them inconsistent—that it would have been more proper to have given the casting vote to the President.³⁵⁴

In sum, a few conclusions can be put forward about the views of the original Framers who spoke or wrote about the constitutional status of the vice presidency. First, there was no unanimity about the Vice President's place within the national government. Many of those who are known to have discussed the matter perceived the Vice President as having attributes (or at least potential attributes) of both political branches. Some, on the other hand, saw the Vice President as solely a legislative branch figure. And, contrary to the modern conception of the vice presidency, none seems to have expressly argued the officeholder was exclusively an executive branch official.

Of course, the perceptions of the original Framers are of less importance regarding the vice presidency than other positions in our national government, since the position and its relationships to other aspects of the charter have been modified by constitutional amendments: the Twelfth Amendment, the Twentieth Amendment and particularly the Twenty-Fifth Amendment.³⁵⁵ Nonetheless, they provide a useful foundation for discussion of the Vice President's constitutional status.

C. *Judicial Dicta*

No court has ever ruled squarely on the question of which branch or branches the Vice President occupies. Nonetheless, there are some dicta on the issue. In the limited academic discourse on the Vice President's placement within the federal government, judicial dicta has been largely overlooked. Perhaps this is because these judicial pronouncements run the gamut, implying that he is part of the legislative branch, that he is part of the executive branch and that he is part of both elected branches.

1. **Judicial Dicta Tying the Vice President to the Legislative Branch**

There are judicial dicta supporting the view that the Vice President is solely a part of the legislative branch. In *Bowsher v. Synar*,³⁵⁶ in which a challenge was brought against the constitutionality of a budget deficit

functional legislative powers (e.g., the veto) notwithstanding Article I, Section 1's seemingly exclusive grant of lawmaking power to Congress.

354. 4 ELLIOT, *supra* note 352, at 26.

355. *See, e.g.*, GOLDSTEIN, *supra* note 269, at 6–8, 13–14, 225–26, 228–48. The views of the Framers of those amendments will be discussed in the companion to this article. *See* Brownell, *supra* note 5.

356. *Bowsher v. Synar*, 478 U.S. 714 (1986).

reduction measure, the Supreme Court had occasion to allude to the vice presidency. It reasoned: “in the impeachment of a President, the presiding officer of the ultimate tribunal is *not* a member of the legislative branch, but the Chief Justice of the United States.”³⁵⁷ The most logical way of reading this pronouncement is to conclude that the presiding officer of the Senate when a presidential impeachment trial is *not* being conducted *is* in fact part of the legislative branch. And that presiding officer would be the Vice President, the President Pro Tempore or another senator.

In *Mississippi v. Johnson*,³⁵⁸ the Supreme Court was asked to enjoin President Andrew Johnson from implementing Reconstruction policies in the American South following the Civil War. In its decision, the Court observed that “the President is the executive department”³⁵⁹ The Court left no room in its formulation for the Vice President in the executive branch.³⁶⁰

In another decision, the D.C. Circuit seemed to reach the same conclusion, that the Vice President must be part of the legislative branch. In *Moore v. House of Representatives*,³⁶¹ involving a question of the constitutionality of a tax bill that did not originate in the House, the court stated that:

it is impossible to say that we intrude upon the prerogatives of the Legislative Branch less severely when we resolve, for example, an *internal* dispute regarding the provision that ‘[t]he Vice President of the United States shall be President of the Senate,’ . . . than we do when we resolve an internal dispute regarding the provision that ‘[n]either House, during the Session of Congress shall, without the Consent of the other, adjourn for more than three days . . .’³⁶²

In this instance, the D.C. Circuit was more explicit than the Supreme Court. By citing the “prerogatives of the Legislative Branch” in the context of a discussion of “internal [legislative branch] disputes” and noting as an example the Vice President presiding over the Senate, the court clearly indicated that the Vice President falls squarely within the legislative department. This is all the more true since the court treated the issue of the Vice President presiding over the Senate as being on par, as a legislative branch matter, with that of congressional adjournment.

The Second Circuit in *Rockefeller v. Commissioner of Internal Revenue*, when reviewing and affirming a Tax Court decision that will be discussed

357. *Id.* at 722 (emphasis added).

358. *Mississippi v. Johnson*, 71 U.S. 475 (1866).

359. *Id.* at 500 (emphasis added).

360. An argument could also be made that the Vice President was left out of the Court’s formulation about Congress as well. The Court stated that “[t]he Congress is the legislative department of the government” *Id.* That statement is not inconsistent, however, with the Vice President being part of the legislative branch since the Vice President is expressly made part of the Senate by being designated its presiding officer and the Senate is obviously part of Congress. See *supra* note 26.

361. *Moore v. U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984).

362. *Id.* at 958 (emphasis added).

below, also had occasion to analyze the Vice President's place within the American constitutional system.³⁶³ As part of its analysis, the court considered whether Nelson Rockefeller's tenure as governor of New York was comparable to his term as Vice President.³⁶⁴ Writing through Judge Henry Friendly, the court believed the positions were dissimilar and implicitly that the vice presidency was a legislative branch post. First, the opinion alluded to Rockefeller as having served in an "executive public office"³⁶⁵ prior to his vice presidency. Second, the court contrasted the vice presidency with the governorship:

We . . . cannot fault the Tax Court's holding that being governor . . . and being Vice President of the United States are not the same trade or business While there are certain areas of overlap, the governorship entails many duties—enforcement of the laws of the state, developing and promoting new laws, supervising a multitude of departments and agencies having thousands of employees and spending billions of dollars, proposing and securing the passage of a budget and the revenues needed to meet it, making appointments, and lobbying for the interests of the state with the Federal Government—which either find no counterparts in the Vice Presidency or find them only to the extent, usually quite limited, which the President has directed. On the other hand, the Vice Presidency involves many duties not found in the governorship of New York—presiding over the Senate, acting on behalf of the President on ceremonial occasions both within and without the United States, and executing special assignments by the President—not to speak of the Vice President's most important task, readying himself for the possibility of assuming the Presidency on a moment's notice. Although positions with somewhat different duties and responsibilities may be found to be within the same trade or business, whether in public or private employment, the Tax Court's finding that the Vice Presidency involved a trade or business for Mr. Rockefeller different from any in which he was engaged at the time of his nomination is not one that we are free to disturb³⁶⁶

Thus, the court observed that the duties of a governor, who is a state executive branch officer, were decidedly different from those of the Vice President.

In 2005, in *Federal Deposit Insurance Corporation v. Hurwitz*, a federal district court considered in part whether the Federal Deposit Insurance Corporation (FDIC) waived legal privileges by providing materials to Vice President Gore.³⁶⁷ In its decision, the court noted that "[t]he Vice President of the United States is an officer of the legislative branch. His official function is

363. See *Estate of Rockefeller v. Comm'r*, 762 F.2d 264, 265 (2d Cir. 1985).

364. See *id.* at 270.

365. See *id.*

366. *Id.*

367. *FDIC v. Hurwitz*, 384 F. Supp. 2d 1039 (S.D. Tex. 2005), *overruled on other grounds* by *FDIC v. Maxxam, Inc.*, 523 F.3d 566 (5th Cir. 2008).

to preside *in* the Senate.”³⁶⁸ In this instance, the court was unambiguous in its position that the Vice President is part of the legislative branch. It concluded that the FDIC waived applicable privileges when it gave materials to an individual in a different branch of government: the Vice President.

Nine years earlier, in *McCalley v. City of Belvidere*,³⁶⁹ a federal district court considered a challenge by a real estate developer against local community officials for allegedly violating several statutory provisions, including the Fair Housing Act of 1968. In discussing whether the officials enjoyed immunity from civil suit, the court noted that “when the vice-president votes to break a tie *in* the Senate, he acts legislatively rather than executively.”³⁷⁰ The court’s use of the term “in” is clear in demonstrating that it viewed the Vice President, at least in his Senate capacity, as acting within the legislative branch.

In *McElrath v. United States*,³⁷¹ the Court of Claims considered a dispute over payment to a former Marine officer. In its discussion, the court made mention of “the casting vote of the Vice-President *in* the Senate.”³⁷² As with *McCalley* and *Hurwitz*, the Court of Claims noted that the Vice President was “in” the Senate while serving as presiding officer.

2. Judicial Dicta Tying the Vice President to the Executive Branch

There are also a host of dicta from judicial decisions, including from the Supreme Court, which indicate the Vice President is part of the executive branch. In *Cheney v. United States District Court*, the Supreme Court reviewed federal trial court discovery orders to Vice President Cheney who was serving as the head of a presidential interagency group on energy policy.³⁷³ The lower court had instructed Cheney, as the President’s delegate, to turn over information related to the panel.³⁷⁴ The question before the Supreme Court was to what extent a federal appeals court may, through a writ of mandamus, “modify or dissolve the [discovery] orders when, by virtue of their overbreadth, enforcement might interfere with the officials in the discharge of their duties and impinge upon the President’s constitutional prerogatives.”³⁷⁵ The Court commented that:

[t]he discovery requests are directed to the Vice President The *Executive Branch*, at its highest level, is seeking the aid of the courts

368. *Id.* at 1098 (emphasis added).

369. *See* *McCalley v. City of Belvidere*, No. 96 C 50162, 1996 WL 734623 (N.D. Ill. Dec. 17, 1996).

370. *Id.* at *9 (emphasis added).

371. *See* *McElrath v. United States*, 12 Ct. Cl. 201, 1800 WL 894 (1876).

372. *Id.* at 213 (emphasis added).

373. *Cheney v. U.S. Dist. Court for Dist. Of Columbia*, 542 U.S. 367, 372 (2004). For further discussion on the decision and its implications on the Vice President’s constitutional placement, *see* Amar, *supra* note 277, at 200–07.

374. *See* *Cheney*, 542 U.S. at 372.

375. *Id.* at 372–73 (emphasis added).

to protect *its* constitutional prerogatives . . . special considerations control when the *Executive Branch's* interests in maintaining the autonomy of *its* office and safeguarding the confidentiality of *its* communications are implicated.³⁷⁶

At yet another point, the Court stated that “[w]e note only that all courts should be mindful of the burdens imposed on the Executive Branch in any future proceedings. Special considerations applicable to the President and the Vice President suggest” the need for judicial “sensitiv[ity] to” these needs.³⁷⁷ The Court also noted that “separation-of-powers considerations should inform a court of appeals’ evaluation of a mandamus petition involving the President or the Vice President.”³⁷⁸ In its rationale, the majority placed no small emphasis on its concern that “the visibility of” the Offices of the President and the Vice President” made both positions an inviting target for lawsuits.³⁷⁹

The Court clearly saw the Vice President as part of the executive branch, at least to the extent Cheney was carrying out the task force duties assigned to him by the President. It made no mention of his legislative branch duties under Article I. Nor, for that matter, did the Court state that the Vice President was exclusively part of the executive branch.³⁸⁰

Similar dicta can be found in Chief Justice Warren Burger’s dissent in *Nixon v. Administrator of General Services*.³⁸¹ In that opinion, which centered on the question of whether former presidents could invoke executive privilege, Burger wrote “executive power was vested in the President; no other offices in the Executive Branch, other than the Presidency and Vice Presidency, were mandated by the Constitution. Only two Executive Branch offices, therefore, are creatures of the Constitution; all other departments and agencies . . . are creatures of the Congress . . .”³⁸² Chief Justice Burger did not think twice about considering the Vice President as a part of the executive branch, at least when performing his executive branch functions.

The D.C. Circuit has also made off-handed references to the Vice President’s executive branch role. In 2008, in *Wilson v. Libby*, the D.C. Circuit examined the question of a civil damages suit against Vice President Cheney and members of his staff. In its ruling, the court noted that “[d]efendants are the United States and four Executive Branch officials—Vice President Richard

376. *Id.* at 385 (emphases added).

377. *Id.* at 391. *See also id.* at 382 (emphasizing the need to “protect[] the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties.”); *id.* (raising concern over potential “interferen[ce] with a coequal branch’s ability to discharge its constitutional responsibilities.”); *id.* at 385 (“Respondents’ reliance on cases that do not involve senior members of the Executive Branch . . . is altogether misplaced.”).

378. *Id.* at 382 (emphasis added).

379. *Id.* at 386.

380. For more on why the *Cheney* decision is not dispositive on the questions discussed in this article, *see* Brownell, *supra* note 5.

381. *See Nixon v. Adm’r of General Services*, 433 U.S. 425 (1977).

382. *Id.* at 508 (Burger, C.J., dissenting).

B. Cheney [among others].”³⁸³ In labeling the Vice President as an executive branch official, the court made clear where it considered the office’s location.

In 1997, in *United States v. Oakar*,³⁸⁴ the court drew upon a similar frame of reference. That decision considered the circumstances of a former House member who allegedly omitted certain financial disclosures under the Ethics in Government Act.³⁸⁵ In its opinion, the D.C. Circuit stated that “[t]he President, Vice President, and *other* Executive Branch officials file their disclosure reports with the Director of Government Ethics Members of the Senate file their disclosure statements with the Secretary of the Senate”³⁸⁶ The “other” formulation clearly tied the Vice President to the executive branch.

In 1993, in *Meyer v. Bush*, the D.C. Circuit considered whether an executive branch task force under Vice President George H.W. Bush was subject to the Freedom of Information Act. The Court commented that “[t]he Vice President is the only senior official *in* the executive branch totally protected from the President’s removal power.”³⁸⁷ Once again, the court placed the Vice President squarely within the executive branch.

In 1992, in *State of New York v. Reilly*, the court reviewed an Environmental Protection Agency decision not to include a number of provisions in certain proposed environmental rules.³⁸⁸ In its opinion, the court examined the role of a task force chaired by Vice President Dan Quayle. It noted that “[t]he Council [on Competitiveness] is chaired by the Vice President and its members include *other* executive branch officials.”³⁸⁹ Once again, the Court’s use of the term “other” clearly linked the Vice President to the executive branch.

Similarly, the Federal Circuit has implicitly categorized the Vice President as being part of the executive branch.³⁹⁰ In *Williams v. United States*, involving judicial claims of back pay and enhanced salary pursuant to statute,³⁹¹ the court observed “[i]t is worth noting that the ‘high-level’ officials to which the . . . recommendations are addressed includes the Vice President and 833 *other* Executive Branch positions”³⁹²

The Fifth Circuit made reference to the Vice President’s constitutional placement in the case of *Texas v. United States*, which involved a challenge to

383. *Wilson v. Libby*, 535 F.3d 697, 701 (D.C. Cir. 2008) (emphasis added), *cert. denied*, 129 S. Ct. 2825 (2009).

384. *United States v. Oakar*, 111 F.3d 146 (D.C. Cir. 1997).

385. *Id.* at 147.

386. *Id.* at 148 n.1 (emphasis added).

387. *Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993) (emphasis added).

388. *New York v. Reilly*, 969 F.2d 1147, 1148–49 (D.C. Cir. 1992).

389. *Id.* at 1150 n.3 (emphasis added).

390. *Williams v. United States*, 240 F.3d 1019, 1046 (Fed. Cir. 2001) (emphasis added).

391. *See id.* at 1023.

392. *Id.* at 1046.

the constitutionality of provision of the Staggers Rail Act.³⁹³ In its decision, the Court commented that “there are political safeguards protecting the independence of the executive branch of the national government.”³⁹⁴ The court listed them as including “the presentment clause, . . . the President’s veto power, . . . and the Vice-President’s position as president of the Senate”³⁹⁵ The court did not conclude outright that, in his Senate capacity, the Vice President was part of the executive branch or legally subordinate to the President. But the court did imply that the Vice President would be at least in sympathy with the President and would be apt to protect the President’s interests.³⁹⁶

In the case of *Siefert v. Alexander*,³⁹⁷ the Seventh Circuit reviewed an action brought by a state court judge against members and staff of a state judicial panel for allegedly restricting the judge’s First Amendment rights. Judge Ilana Rovner filed a dissent in which she mentioned the vice presidency. She observed that the Hatch Act “exempts the two elected executive branch employees, the president and vice president”³⁹⁸

The federal district court for Puerto Rico also had occasion to mention the vice presidency in passing. The case of *Municipio Autonomo de Ponce v. Office of Management and Budget* involved a challenge to the government’s classification of whether a community qualified for assistance under a federal health statute. In the decision, the court observed that “the Executive Branch of government is led by a President and Vice President”³⁹⁹

In 2009, the U.S. District Court for the District of Columbia issued similar dicta. *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*⁴⁰⁰ involved yet another dispute over documents with respect to the vice presidency, this time relating to conversations between Vice President Cheney and a Special Counsel. The court concluded that it “agrees with DOJ that the discussion between [the Special Counsel] . . . and Vice President Cheney is more appropriately considered a protected inter-agency disclosure.”⁴⁰¹

A federal court in *Sykes v. Frank* dismissed a pro se suit against former President George W. Bush and former Vice President Cheney, among

393. See *Texas v. United States*, 730 F.2d 339 (5th Cir. 1984).

394. *Id.* at 355.

395. *Id.* at 355 n.25.

396. The Vice President, of course, is constitutionally independent of the President and has frequently acted accordingly as President of the Senate. See Brownell, *Independence*, *supra* note 69.

397. See *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010).

398. *Id.* at 993 (Rovner, J., dissenting).

399. *Municipio Autonomo de Ponce v. U.S. Office of Mgmt. and Budget*, No 14-1502 (JAF), 2014 WL 4180767 at *9 (D.P.R. Aug. 12, 2014).

400. See *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t of Justice*, 658 F. Supp. 2d 217 (D.D.C. 2009).

401. *Id.* at 237.

others.⁴⁰² The court recognized the Vice President as being part of the executive branch. The district court adopted the magistrate's report and recommendation "in its entirety."⁴⁰³ The magistrate judge observed that "the former President and Vice President of the United States [were] . . . officials in the executive branch of the federal government."⁴⁰⁴ The magistrate judge further noted that "[t]he present action cannot proceed against Defendants Bush and Cheney because of the complete immunity enjoyed by the President and Vice-President of the United States in performing the duties of their respective offices."⁴⁰⁵ Citing *Nixon v. Fitzgerald*, the magistrate judge explained that "[a]lthough the *Nixon* court did not specifically mention the office of Vice-President, *it is clear* from the Court's analysis that the rationale for absolute immunity applies to that office as well."⁴⁰⁶ Because the former Vice President was "protected by absolute immunity," the suit was dismissed.⁴⁰⁷ Here, the magistrate judge treated the Vice President more as an executive branch official, explicitly referencing *Nixon* and concluding the Vice President enjoyed absolute immunity for his official acts, along the same lines as the chief executive.

Finally, the U.S. District Court for the District of Columbia has also assumed the Vice President to be part of the executive branch. In *Walker v. Cheney*, which centered on Vice President Cheney's withholding of materials from the then-General Accounting Office,⁴⁰⁸ the court concluded that:

[t]his rigorous standing assessment may seem overly protective of the Vice President, *and hence of the Executive Branch*, at the expense of the statutory responsibilities of the Comptroller General and the constitutional responsibilities of Congress. But the point is not whether the Executive Branch or the Comptroller General (an agent of Congress) is correct with respect to this particular dispute.⁴⁰⁹

3. Judicial Dicta Tying the Vice President to Both Political Branches

There are also dicta from the courts implying the Vice President is part of both elected branches.

First, in *Davis v. Countrywide Home Loans, Inc.*,⁴¹⁰ a federal district court considered a dispute between a mortgagor and lender over, among things,

402. Sykes v. Frank, No. 8:08-4049-GRA-BHH, 2009 WL 614806, at *8 (D.S.C. Mar. 6, 2009).

403. *See id.* at *2.

404. *Id.* at *8.

405. *Id.*

406. *Id.* at *8 n.3 (emphasis added).

407. *See* Sykes v. Frank, No. 8:08-4049-GRA-BHH, 2009 WL 614806 at *8 (D.S.C. Mar. 6, 2009).

408. The name of the entity has since been changed to the Government Accountability Office.

409. *Walker v. Cheney*, 230 F. Supp. 2d. 51, 74–75 (D.D.C. 2002) (emphasis added).

410. *Davis v. Countrywide Home Loans, Inc.*, No. H-13-623, 2014 WL 838146, at *1 (S.D. Tex. Mar. 3, 2014).

allegations of fraud. In its analysis, the court noted the executive branch and legislative branch capacities in which the Vice President operates. The court reasoned that:

Ms. Hill acted in separate capacities, which is not uncommon in our society. After all, the Vice President of the United States also serves as the Senate's President, with the power to cast the tie-breaking vote when that body is equally divided. . . . It would hardly be unlawful for the Vice President to attend a state funeral and break a Senate tie on the same day.⁴¹¹

Clearly, the court viewed the Vice President as serving in separate legislative branch and executive branch roles. When breaking tie votes the Vice President is obviously acting in a legislative branch capacity,⁴¹² while attending a state funeral he is almost certainly acting in an executive branch capacity.⁴¹³

A second example of a federal court viewing the Vice President as part of both political branches involved a federal tax court decision, the appeal of which was discussed earlier. In *Estate of Nelson A. Rockefeller v. Commissioner of Internal Revenue*,⁴¹⁴ the court considered the tax treatment of expenses involved with Rockefeller's confirmation process. The court noted the Vice President's singular status under the Constitution. It stated that:

the office of Vice President is a unique position The Vice President stands by to succeed the President in case of death, resignation, or removal from office He holds the position of President of the Senate . . . and serves as alter ego for the President of the United States on many occasions. In addition, the Vice President has, in recent years, carried a heavy load of responsibilities in the administration of the executive branch of the Government.⁴¹⁵

411. *Id.* at *4 n.6.

412. *See supra* notes 101–02, 129–32, 219–40 and 370–71 and accompanying text.

413. *See, e.g.*, Press Release, Office of the Vice President, President Obama Announces Presidential Delegation to the State of Israel to Attend the State Funeral of Former Prime Minister Ariel Sharon (Jan. 12, 2004), *available at* <http://www.whitehouse.gov/the-press-office/2014/01/12/president-obama-announces-presidential-delegation-state-israel-attend-st> (“President Barack Obama today announced the designation of a Presidential Delegation to the State of Israel to attend the State Funeral of Former Prime Minister Ariel Sharon. The Honorable Joseph R. Biden, Jr., Vice President of the United States, will lead the delegation.”). *See also* JACK LECHTEL, *THE VICE PRESIDENCY IN FOREIGN POLICY: FROM MONDALE TO CHENEY* 56, 119 (2009).

414. *Estate of Nelson A. Rockefeller v. Comm’r*, 83 T.C. 368, 369 (1984), *aff’d*, *Estate of Rockefeller v. Comm’r*, 762 F.2d 264 (2d Cir. 1985).

415. *Id.* at 376. *See also id.* at 376 n.8 (quoting with approval H. Rept. No. 203, to accompany H.J. Res. 1, 89th Cong., 1st Sess. 14–15 (1965); S. Rept. No. 66, to accompany S.J. Res. 1, 89th Cong., 1st Sess. 14 (1965).) (“In explaining the Joint Resolution which led to the 25th Amendment, the accompanying reports dealing with section 2 include the following: ‘In considering this section of the proposal, it was observed that the office of the Vice President has become one of the most important positions in our country. The days are long past when it was largely honorary and of little importance, as has been previously pointed out. For more than a decade the Vice President has borne specific and important responsibilities in the executive

Therefore, the court implied that the Vice President has roles in both political branches.

At still another juncture, a federal court has issued dicta as part of its treatment of the question of vice presidential immunity from civil litigation stemming from his official duties.⁴¹⁶ These passages subtly reaffirm that the Vice President resides in both elected branches. In *McCullough v. United States*,⁴¹⁷ a district court again upheld a magistrate judge's "Report and Recommendation in its entirety."⁴¹⁸ The magistrate judge's opinion involved dismissal of a *pro se* suit against former Vice President Cheney, among others.⁴¹⁹ He reasoned that "[w]hile case law does not appear to extend the protection of absolute immunity to the Vice President, Plaintiff named [the Vice President] . . . [in] his role as President of the Senate. Therefore, it is possible that Defendant Cheney may be protected by legislative immunity, or in the alternative, be entitled to qualified immunity."⁴²⁰ The judge cautioned "[h]owever, [that] as the complaint is subject to dismissal on other grounds, a detailed discussion regarding the possible scope of former Vice President Cheney's immunity is unnecessary."⁴²¹

Here, the magistrate judge seemed to consider the Vice President as part of both elected branches. He expressly noted the Vice President's status as President of the Senate, and that it may entitle him to legislative immunity. At the same time, he commented "in the alternative" that the Vice President might be entitled to qualified immunity. The "in the alternative" formulation implies immunity that is not based on the Vice President's legislative branch role since qualified immunity covers senior members of the executive branch other than the President and not federal lawmakers who enjoy absolute immunity for official acts.⁴²²

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branch of Government. He has come to share and participate in the executive functioning of our Government, so that in the event of tragedy there would be no break in the informed exercise of executive authority."").

416. The question of vice presidential civil immunity for official acts was also raised in *Wilson v. Libby*, but the court declined to address the question. See *Wilson v. Libby*, 535 F.3d 697, 713 n.3 (D.C. Cir. 2008) ("Because our decision, based on the grounds considered by the district court, results in the dismissal of all claims against the Vice President of the United States, we need not, and do not, consider his alternate claim for absolute Vice-Presidential immunity."). For the limited literature on vice presidential civil immunity, see Myers, *supra* note 3; cf. Amar & Katyal, *supra* note 107, at 713–14.

417. *McCullough v. United States*, No. 8:08-4137-GRA-WMC, 2009 WL 367371 (D.S.C. Feb. 13, 2009).

418. *Id.* at *2. The magistrate judge was the same as in *Sykes v. Frank*.

419. *See id.* at *1.

420. *Id.* at *4 n.4.

421. *Id.* (emphasis added).

422. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Lower level members of the executive branch, such as prosecutors when fulfilling certain functions, are entitled to absolute immunity for official acts. See *Imbler v. Pachtman*, 424 U.S. 409 (1976).

In conclusion, there are some judicial dicta that support the supposition that the Vice President is part of the legislative branch; there are still more that contend he is part of the executive branch; and, finally, some that he is part of both political branches.⁴²³ The only construction that can give effect to this jumble of dicta is that the Vice President belongs to both elected branches with his exact location varying depending on the context.

D. Synthesizing the “Competing” Views of the Vice Presidency

One of the most compelling arguments why the Vice President should be seen as occupying a position in both political branches is because it is the most practical, reasonable way to reconcile the authority that supports the Vice President being an executive branch official and the authority that supports him being a legislative branch official. By acknowledging that the Vice President has roles to play in both elected branches, authority on both sides of the ledger can be properly reconciled. To conclude otherwise would be to cavalierly overlook mounds of persuasive authority on one side of the issue or the other.

Doubtless, some may attempt to discredit such an argument as a “split-the-difference,” “make everybody happy” approach. Such a rejoinder falls short of the mark for two reasons. First, the dual-branch outlook clearly comports with a fundamental principle of constitutional construction, which counsels that textual provisions should be read in such a manner so as to ensure that all the Constitution’s provisions are given full effect.⁴²⁴ The Supreme Court has endorsed this precept on countless occasions. In *Marbury v. Madison*, the Court through Chief Justice John Marshall declared that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect”⁴²⁵ Several years later, the Court, again through the great Chief Justice,

423. Courts at the state level have also been inconsistent in similar contexts. See *Danforth v. Cason*, 507 S.W.2d 405, 414 (Mo. 1974) (stating that the lieutenant governor, who presides over the state senate is “a member of the executive branch of government”); *Jubelirer v. Singel*, 638 A.2d 352, 357 (Pa. Commw. Ct. 1994) (“[T]he Pennsylvania Supreme Court [has] indicated that the Lieutenant Governor, acting in his capacity as President of the Senate, would also be immunized from suit under . . . the [legislative branch’s] Speech and [sic] Debate Clause [protections].”) (internal citation omitted); *Brown v. Owen*, 206 P.3d 310, 320 (Wash. 2009) (“While serving as the presiding officer of the senate, the lieutenant governor is an officer of the legislative branch.”).

424. See Reading instrument as a whole; giving effect to every word and part, 16 AM. JUR. 2D CONSTITUTIONAL LAW § 65 (2009 2d. ed.) (“It is a basic rule of construction that a constitutional provision should be construed to make all its parts harmonize and to give a sensible and intelligent effect to each part”)

425. *Marbury v. Madison*, 5 U.S. 137, 174 (1803). See also, e.g., *Ullmann v. United States*, 350 U.S. 422, 428 (1956) (“no constitutional guarantee enjoys preference, so none should suffer subordination or deletion.”); *Myers v. United States*, 272 U.S. 52, 151 (1926) (Taft, C.J. for the Court) (“the usual canon of interpretation of that instrument [the Constitution], . . . requires that real effect should be given to all the words it uses.”); *Prout v. Starr*, 188 U.S. 537, 544 (1903) (“It is one of the important functions of this Court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed.”); *Hurtado v. California*, 110 U.S. 516, 534 (1884) (“According to a recognized

observed that “provisions of the Constitution are equally obligatory, and are to be equally respected [T]he duty of the Court [is] to construe the Constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other.”⁴²⁶

In the case of the Vice President, there are express textual provisions that support his being part of the legislative branch, such as the clauses designating him as President of the Senate, permitting him to break tie votes and assigning him a role in the counting, and arguably certifying, of electoral votes.⁴²⁷ There are also express textual provisions that support the Vice President being part of the executive branch, such as his ties to the President as to election, tenure, qualifications, and removal, and his Twenty-Fifth Amendment links to the cabinet.⁴²⁸ And, the President Pro Tempore Clause bridges the gap between the two, strongly implying that the Vice President is part of the legislative branch when presiding over the upper chamber, but not when he is carrying out executive branch business. Were this synthesis to be rejected, entire clauses would need to be either turned completely on their head or read out of the Constitution altogether. The same unfortunate result would occur regarding the structural arguments that can be arrayed on both sides of the issue.⁴²⁹ If not reconciled, a score of structural linkages would also be summarily discarded. Without such a synthesis, many views of the Framers and judicial dicta would also need to be cast aside.⁴³⁰ By determining the context in which the Vice President acts at a particular moment in time, the “competing” clauses, structure, views of the Framers and dicta can be reconciled.

Second, it is important to note that no textual provision *precludes* such a synthesis. As will be discussed in the companion to this piece, the

canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous.”); *Prigg v. Pennsylvania*, 41 U.S. 539, 612 (1842) (“No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them.”); *Holmes v. Jennison*, 39 U.S. 540, 570–71 (1840) (Taney, C.J., for the Court) (“In expounding the Constitution of the United States, every word must have its due force and appropriate meaning, for it is evident from the whole instrument that no word was unnecessarily used or needlessly added. . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning”); *cf.* THE FEDERALIST NO. 78, at 392, 396 (Alexander Hamilton) (Garry Wills ed., 1982) (“It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other In such a case, it is the province of the courts to liquidate and fix their meaning and operation: So far as they can by any fair construction be reconciled to each other; reason and law conspire to dictate that this should be done”).

426. *Cohens v. Virginia*, 19 U.S. 264, 393 (1821) (Marshall, C.J., for the Court).

427. *See supra* Parts III.A.1.a.

428. *See supra* Part III.A.2.a.

429. *See supra* Part III.A.1.b.; Part III.A.2.b.

430. *See supra* Part III.B; Part III.C.

Incompatibility Clause does not apply to the Vice President, because he is not a member of Congress. Nor does any other part of the Constitution prevent such a construction. Accordingly, there is no textual reason *not* to read the seemingly competing provisions in concert with one another. Indeed, as just noted, the President Pro Tempore Clause counsels that they should be so interpreted.

IV. CONCLUSION

The question considered in this article and its companion is whether the Vice President is part of the legislative branch, the executive branch, both or neither? In answering this query the best approach is to look to context. The setting in which the Vice President carries out his duties will dictate which branch he is in at any particular moment in time. In this regard, he is a constitutional chameleon. When presiding over the Senate, he is part of the legislative branch. When providing the President policy advice or huddling with the cabinet in the context of determining presidential inability, he is part of the executive branch. As the President Pro Tempore Clause teaches, he is never in both political branches at once.

As a practical matter, given the modern expectations and conventions surrounding the position, the Vice President is almost always part of the executive branch. But that is not a matter of constitutional prescription. What if the 2008 election had failed to provide a majority of electoral votes for Barack Obama and Joe Biden, and selection of the President and Vice President had been thrown to the House and Senate respectively?⁴³¹ What if, as part of a grand political bargain, the House had selected Obama as President and the Senate had chosen Sarah Palin as Vice President? Under such a scenario, with two politically incompatible individuals as President and Vice President, President Obama might have done his best to remove the Vice President from the executive branch, excepting Palin's roles under the Twenty-Fifth Amendment, and her statutory responsibilities. Thus, for four years, the vice presidency would have returned to being largely a legislative branch post.⁴³²

Another hypothetical might involve the fallout from an unsuccessful effort by the Vice President to establish the President's inability under Section 4 of the Twenty-Fifth Amendment.⁴³³ This too could result in the Vice President's

431. An email exchange with Joel Goldstein prompted this hypothetical. *See also* Garvey, *supra* note 3, at 584–85 (providing another related scenario).

432. *See, e.g.*, Irving G. Williams, *The American Vice Presidency*, in *CURRENT HISTORY* 254, 273 (1974) (“In general, the Vice President who is out of favor may be largely reduced to his purely constitutional role of Senate President . . .”). Revitalization of the presiding officer function has in fact been discussed from time to time during the modern vice presidential period. *See, e.g.*, Ann Devroy, *Quayle Weighs His Role; Activist Senate Presidency a Possibility*, *WASH. POST*, Dec. 3 1988, at A1.

433. *See* Brownell, *supra* note 7, at 592.

virtual banishment from the executive branch. Lest these hypotheticals be thought too farfetched, it should be remembered that Vice President Spiro Agnew's relationship with President Richard Nixon grew so strained that Agnew gave serious thought to withdrawing from the executive branch altogether.⁴³⁴ During a heated exchange in the George W. Bush Administration, the President's chief of staff Josh Bolten threatened to move the Vice President's chief of staff back to the Senate if the Vice President took any further independent actions.⁴³⁵

These scenarios reflect that, with the exception of his responsibilities under the Twenty-Fifth Amendment, the modern executive branch trappings of the vice presidency can be shorn away by the President and leave the position largely back where it started: presiding over the Senate and breaking tie votes.

While the notion that the Vice President resides in two branches of government has drawn snickers in the popular press and condemnation in partisan debate,⁴³⁶ a sober analysis reflects that it is the most persuasive view as to the Vice President's location in the American system of government. This is manifested by constitutional text, structure, the views of the original Framers and judicial dicta. The companion to this article will reinforce this conclusion as it evaluates the history of the office, modern vice presidential opinion and potential counterarguments.

434. See SPIRO T. AGNEW, *GO QUIETLY . . . OR ELSE: HIS OWN STORY OF THE EVENTS LEADING TO HIS RESIGNATION* 152 (1980).

435. See PETER BAKER, *DAYS OF FIRE: BUSH AND CHENEY IN THE WHITE HOUSE* 579 (2013).

436. See Brownell, *supra* note 5.